No. 91-779-CSX
Status: GRANTED

Title: Burlington Northern Railroad Company, Petitioner
v.
William D. Ford and Thomas L. Johnson

Docketed:
November 12, 1991

Court: Supreme Court of Montana

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Counsel for respondent: Wood,Gary K., Fain Jr.,RobertS., Racicot,Marc

NOTE: DUE 111091-SUN 111191-HOL 40 corr'd copies of pet rec'd 112791 (see ltr)

Entry	Date	Note	Proceedings and Orders
1	Nov 12 1991	G	Petition for writ of certiorari filed.
2	Dec 12 1991		Brief of respondents William Ford, et al. in opposition filed.
3	Dec 18 1991		DISTRIBUTED. January 10, 1992
4	Dec 20 1991	X	Reply brief of petitioner Burlington Northern Railroad filed.
6	Jan 13 1992		REDISTRIBUTED. January 17, 1992
8	Jan 21 1992		REDISTRIBUTED. January 24, 1992
9	Jan 27 1992		Petition GRANTED.
			**********
10	Feb 11 1992		Record filed.
		*	Original proceedings Montana 13th Judicial District Court, Yellowstone County (1 Box)
11	Feb 14 1992		Record filed.
		*	Original proceedings Supreme Court of Montana.
12	Mar 4 1992		SET FOR ARGUMENT MONDAY, APRIL 20, 1992. (2ND CASE).
13	Mar 9 1992		Brief of petitioner Burlington N. RR filed.
14	Mar 10 1992		Joint appendix filed.
15	Mar 12 1992		Brief amicus curiae of Association of American Railroads filed.
16	Mar 12 1992		Brief amicus curiae of Washington Legal Foundation filed.
17	Mar 18 1992		CIRCULATED.
19	Apr 7 1992	X	Brief amicus curiae of Montana Trial Lawyers Assn. filed.
20	Apr 7 1992	X	Brief amici curiae of Montana, et al. filed.
18	Apr 8 1992	X	Brief of respondents William D. Ford and Thomas L. Johnson filed.
21	Apr 15 1992	X	Reply brief of petitioner Burlington Northern Railroad Co. filed.
22	Apr 20 1992		ARGUED.

No. 91-779

Supreme Court, U.S.
FILED
NOV 12 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

WILLIAM D. FORD,
Respondent.

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

THOMAS L. JOHNSON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

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PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a state venue law which provides that non-resident corporations may be sued in any county in the state, whereas resident corporations may be sued only in their county of residence, violates the Equal Protection Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

All parties to the proceeding below are identified in the caption of this petition.

Burlington Northern, Inc., is the parent company of petitioner Burlington Northern Railroad Company. The partially owned subsidiaries of petitioner Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and North Western Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
M T Properties, Inc.
Northern Radio Ltd.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

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BURLINGTON NORTHERN RAILROAD COMPANY,
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Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Burlington Northern Railroad Company ("BN") respectfully prays that a writ of certiorari issue to review the decision and order of the Supreme Court of the State of Montana entered in the above cases on August 12, 1991.

OPINIONS BELOW

The unreported decision and order of the Montana Supreme Court is reproduced in the Appendix ("App.") at 1a to 15a. The two unreported decisions and orders of

the Yellowstone County trial courts are reproduced respectively at 16a, and 18a.[1]

JURISDICTION

The decision and order of the Supreme Court of the State of Montana was entered on August 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The applicable Montana venue statute, Mont. Code Ann. § 25-2-118 (1989) ("MCA"), is set forth verbatim in the Appendix at 26a. Most pertinent, subsections (1) and (2) of the statute provide that:

> (1) . . . the proper place for trial for all civil actions is the county in which the defendants or any of them reside at the commencement of the action;
>
> (2) if none of the defendants reside in the state, the proper place of trial is the county the plaintiff designates in the complaint; . . . .

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides as follows:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend. XIV, § 1.

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[1] This litigation began as two separate cases, *William D. Ford v. Burlington Northern R.R.*, No. DV-89-974, and *Thomas L. Johnson v. Burlington Northern R.R.*, No. DV-89-975, both brought in the Montana Thirteenth Judicial District Court, Yellowstone County. Two different trial judges issued separate decisions, but those decisions were identical in substance, and the Supreme Court of the State of Montana consolidated the cases and decided them together.

STATEMENT OF THE CASE

This petition concerns the applicability of the Equal Protection Clause of the Fourteenth Amendment to discrimination in state court venue. Montana's general venue statute discriminates in a real and substantial way against out-of-state corporations—permitting suits to be filed against them in any county, while strictly limiting venue against resident corporations. The court below, finding "inconsistency" in the decisions of this Court, concluded that it was unnecessary to determine whether there was a rational basis for the disparate treatment in the state venue law. This case provides the opportunity for this Court to eliminate the perceived tension in its prior decisions, which have divided state supreme courts and resulted in extreme forum shopping within state court systems.

A. The Montana Venue System

The Montana venue system which gives rise to this case consists of three basic elements. First and most important, the applicable venue statute, MCA § 25-2-118, states that while residents of the state may be sued only in their county of residence, non-residents may be sued in any county in the state the plaintiff chooses. App. 26a. Second, under controlling state decisional law, an out-of-state corporation may not acquire "resident" status for purposes of this venue statute—even, for instance, by designating a principal place of business and an agent for receipt of service in a particular county.[2] Third, Montana maintains an "open door" policy which permits out-of-

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[2] *E.g., Haug v. Burlington Northern R.R.*, 236 Mont. 368, 770 P.2d 517, 519 (1989) (citations omitted). In *Haug*, the Montana Supreme Court also overruled another decision, *McAlear v. Kasak*, 225 Mont. 113, 731 P.2d 908 (1987), which had eliminated, through statutory construction, the "'any county' option" for tort suits against non-residents.

state plaintiffs to sue in Montana state courts, even when the alleged injuries occurred outside the state.[3]

B. The Proceedings Below

BN is a corporation organized under the laws of the State of Delaware, with its principal place of business in Fort Worth, Texas. BN operates rail lines in twenty-five states, including Montana, and has its principal place of business in Montana in Hill County.[4] As required by state law, BN has also designated a registered agent for service of process in Montana, located in Lewis and Clark County.[5]

The two underlying actions were brought against BN under the Federal Employees Liability Act ("FELA"), 45 U.S.C. §§ 1-60 (1981), each in state district court in Yellowstone County, Montana. BN has some trackage in Yellowstone County but, as noted above, its principal place of business in the state is located in Hill County. In each case below, the plaintiff was a resident of Sheridan, Wyoming, and was allegedly injured while working on BN's railroad premises in Sheridan. The lead counsel for both plaintiffs was a law firm located in Colorado.[6] Thus, the actions were brought in a selected Montana

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[3] *E.g., Haug v. Burlington Northern R.R.*, 770 P.2d at 521 (citations omitted); *State ex rel. Burlington Northern R.R. v. District Court*, 236 Mont. 368, 746 P.2d 1077, 1080 (1987); *Bevacqua v. Burlington Northern, Inc.*, 138 Mont. 237, 598 P.2d 1124, 1125 (1979); *Labella v. Burlington Northern R.R.*, 182 Mont. 202, 595 P.2d 1184, 1187 (1979).

[4] Hill County is in the far north of Montana, bordering on Canada. Yellowstone County, where the underlying actions were brought, is in the southern part of the state, four or five counties away.

[5] *See* MCA § 35-1-1012 (requirement for "registered agent" for receiving service of process).

[6] Ford and Johnson were both represented by a firm located in Aurora, Colorado, with local Montana counsel.

state court by out-of-state counsel, representing out-of-state plaintiffs, alleging out-of-state injuries.

In each case, BN moved for change of venue from Yellowstone County to Hill County, its Montana headquarters. In so moving, BN challenged the constitutionality of the Montana venue statute on equal protection grounds, claiming invidious discrimination as between resident and non-resident corporations. The Yellowstone County trial courts denied BN's venue motions, following controlling state law that "a foreign corporation has no county of residence for venue purposes and can be sued in any county selected by the plaintiff." App. 21a (citations omitted).[7] The trial courts also upheld the constitutionality of the venue statute, referring to "the hazardous conditions surrounding the railroad industry," App. 24a, and finding no disparate treatment because "[a]ll railroads incorporated in other states and doing business in Montana are treated similarly and can be sued in any county the plaintiff chooses." App. 17a, 24a.

On appeal, the Montana Supreme Court affirmed. The court declined BN's express invitation to construe the Montana venue statute so as to permit an out-of-state corporation to acquire a residence for purposes of venue. App. 5a-6a. The court then turned to the constitutional issue. Noting "some inconsistency" in the federal precedents, the court focused initially on a 1904 decision of this Court, citing it for the proposition that "the Fourteenth Amendment does not guarantee citizens the right to have disputes determined in one forum, as opposed to another." App. 6a. (quoting *Cincinnati St. Ry. v. Snell*, 193 U.S. 30, 36-37 (1904) ("*Snell*")). The court below acknowledged this Court's decision in *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927) ("*Saunders*"), which held that the Equal Protection Clause does apply

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[7] Under MCA § 25-2-201(1), a change of venue is required only "when the county designated in the complaint is not the proper county . . . ."

to matters of state court venue and that a state venue law may not discriminate between resident and non-resident corporations. However, the court concluded that "subsequent decisions by the U.S. Supreme Court raise a question about whether *Saunders* continues to be good law." App. 11a. The court then expressed its view repeatedly that *Snell* has been revived by this Court as good law. App. 12a, 13a, 14a.

The Montana Supreme Court specifically declined to address the equal protection issue raised by BN—whether the Montana venue statute has "a rational basis for treating out-of-state corporations differently from domestic corporations . . . ." App. 9a. Instead, the court focused on a perceived federal policy, which it found to be embodied in the FELA, allowing railroad workers maximum flexibility in their choice of forum, and found that this national policy offers "a justification for disparate treatment in this case . . . ." App. 11a.[8] The decision below also found that no real discrimination arose in the operation of the Montana venue statute, because BN could have been sued in the federal district court for Montana, which sits in Yellowstone County among other places. App. 15a.[9]

REASONS FOR GRANTING THE WRIT

This case presents the question whether the Equal Protection Clause of the Fourteenth Amendment prohibits discrimination in state venue laws against non-resident corporations. The question is an important one: if states can utilize different venue provisions for out-of-state corporations, there is a temptation to permit broad venue, and hence wide-open forum shopping, against those defendants.

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[8] The Montana venue statute is of general applicability, and does not address FELA claims specifically.

[9] Section 56 of the FELA provides for concurrent state and federal court jurisdiction, and permits a defendant railroad to be sued in any federal district in which it is currently doing business. 45 U.S.C. § 56 (1981).

The opinion below exemplifies the confusion engendered by this Court's decisions concerning the application of the Equal Protection Clause to state venue statutes. The court below noted "some inconsistency in the federal case law," App. 6a, and then discussed three decisions of this Court addressing whether a state venue law violated the Equal Protection Clause. The court relied on the earliest of the three cases (*Snell*), because it doubted the authority of the central case invalidating a statute virtually identical to the one involved here (*Saunders*). That doubt stemmed from a footnote in this Court's most recent decision, which questioned the continuing validity of *Saunders*. See App. 9a (citing *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976) ("*Starnes*")). As a result, the court below found it unnecessary even to identify a rational basis for the patent discrimination involved here.

In the absence of definitive guidance from this Court, the state courts have reached conflicting results as to whether, and to what extent, non-resident corporations are entitled to equal treatment in venue provisions. Some courts, following *Saunders*, have invalidated discriminatory venue provisions, some have upheld them, and some have recognized the constitutional issue but have construed their statutes to permit out-of-state corporations to acquire a residence for venue purposes. In other states, the discriminatory provisions remain in effect, but no challenge has reached an appellate court.

This issue is of great importance in the administration of the state courts. A discriminatory venue provision such as that upheld in the decision below permits rampant forum shopping against out-of-state corporate defendants. For example, over 85 percent of the cases brought against BN in Montana state court were filed in just two of Montana's fifty-six counties. Not a single one of those cases involved an accident that occurred in the county of venue.

Such forum shopping has become a potent weapon in enhancing jury verdicts against an arbitrarily dis-

favored class of defendants. Thus, review of the decision below should be granted in order to eliminate the present confusion and its highly undesirable effects.

I. THE DECISION BELOW EXEMPLIFIES CONFUSION WHETHER THE EQUAL PROTECTION CLAUSE PROHIBITS DISCRIMINATION AGAINST OUT-OF-STATE CORPORATIONS IN STATE COURT VENUE

Harking back to turn-of-the-century law, the Montana Supreme Court appears to have viewed the form of discrimination found in the Montana venue statute as beyond the reach of the Equal Protection Clause. Thus, it seems to have been assumed that because "only" venue is involved here, or because the disadvantaged class consists "only" of out-of-state corporations, no serious constitutional issue is presented.

In brushing aside BN's equal protection challenge, the court below gave pivotal importance to this Court's 1904 decision in *Snell*, an early and unsuccessful equal protection challenge to a very different state venue law. 193 U.S. at 36-37. The statute in question permitted the plaintiff to obtain a transfer of venue under certain circumstances, while a corporate defendant could not. *Id.* at 34. Thus, the legislative classification involved was one of individuals versus corporations (or perhaps, plaintiffs versus defendants). This Court denied the equal protection claim of the defendant corporation, observing in a passage quoted by the court below that "it is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate . . . ." 193 U.S. at 36. In context, *Snell* may be read merely to mean that the legislative classification there was reasonable based on real differences between individuals and corporate defendants.[10]

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[10] Venue statutes inevitably involve some line-drawing, because the plaintiff (individual) will frequently want one forum and the defendant (corporation) another, and it is impossible for both to have their way. Making distinctions between plaintiffs and defendants may often have some reasonable basis.

In contrast, the statute at issue in this Court's 1927 *Saunders* decision was virtually identical to the one involved here. In *Saunders*, a domestic corporation could be sued only where it had a place of business or where its chief officer resided, but a foreign corporation could be sued in any county in the state. 274 U.S. at 492-93. The defendant, an Ohio corporation, conducted business in the state solely in Arkansas County, where it maintained a warehouse and had a designated agent for service of process. *Id.* at 491. When injured in the defendant's warehouse, the plaintiff sued elsewhere, in Saline County. *Id.*

The *Saunders* Court directly addressed the dicta in *Snell* about equal protection applying only to "fundamental rights," and categorically rejected the proposition that venue rights are "beyond the reach of the equal protection clause." 274 U.S. at 495-96.[11] The Court pronounced that the statutory venue discrimination against out-of-state corporations could be permitted only if "based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation." *Id.* at 493 (citations omitted).[12] Under that standard, the Court struck down the Arkansas statute as violating equal protection: "there is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or natural person." *Id.* at 494. More specifically, the con-

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[11] The *Saunders* Court read *Snell* simply as a case in which the legislative classification had a rational and legitimate basis. 274 U.S. at 496. In another case decided shortly after *Saunders*, involving discrimination in venue as between individuals and corporations, the state law was upheld under equal protection analysis. *Bain Peanut v. Pinson*, 282 U.S. 499 (1931).

[12] In recent decisions in the equal protection field, particularly when discrimination is alleged by out-of-state residents, this Court has adhered to the requirement of a rational basis relating to a legitimate state interest. *E.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981).

stitutional protection in *Saunders* was extended to a party described as a "foreign corporation[] doing business within the state by her permission, and therefore having a fixed place of business therein and a resident agent on whom process may be served"—a description that fits BN exactly.[13]

In the decision below, the Montana Supreme Court not only sought to distinguish *Saunders*, but also questioned its continuing vitality. App. 11a. In particular, the court below appeared to read this Court's more recent decision in *Starnes* as having implicitly overruled *Saunders* and revived the sweeping language of *Snell*.

The statute in *Starnes* provided that, whereas out-of-state defendants could be sued in any county in the state, domestic corporations could be sued only in their county of residence—unless the plaintiff could make a preliminary showing as to his or her cause of action. 425 U.S. at 638. In *Starnes*, the out-of-state defendant had complained only of the effects of the statute's unequal application of the *prima facie* showing requirement, as a matter of pre-trial tactical maneuvering; the Court pointedly noted that defendant "does not challenge" the aspect of the venue statute authorizing "broader venue geographically for suits against foreign corporations than for suits against domestic corporations." *Id.* at 645-46. Thus, the issue presented in the present case was never raised in *Starnes*.

In response to the defendant's challenge to the unequal preliminary showing requirement, the Court in *Starnes* examined not only the language of the statute, but also the practical effects of its distinction between resident

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[13] *Id.* at 494; *see supra*, at 4. The only factual distinction between the two cases is of no consequence. In *Saunders*, the underlying action had been brought in a county in which the defendant corporation conducted no business. *Id.* at 491. That fact, however, was not treated as material: what was critical was the disparate treatment of resident and non-resident corporations. Thus, it is irrelevant here that BN conducts some business in Yellowstone County.

and non-resident corporations, observing that "[j]ust as a statute nondiscriminatory on its face may be grossly discriminatory in its operation, . . . so may a statute discriminatory on its face be nondiscriminatory in its operation." *Id.* at 645 (citations omitted). As it turned out, the showing required to be made by plaintiffs in cases against domestic corporations was merely a *prima facie* matter, quite easily satisfied in practice; on this basis, the Court found that there was no real and substantial discrimination against out-of-state corporations. *Id.* at 643-45. This result is easily reconciled with the holding in *Saunders*, where there was discrimination both on the face of the statute and in practice.

The Montana Supreme Court also attached substantial weight to a footnote in Justice Brennan's opinion for the Court in *Starnes*, questioning the continuing vitality of *Saunders*. *Id.* at 645 n.6 (dicta). But that footnote did not purport to reach the question whether *Saunders* was still good law, and certainly it did not overrule *Saunders*. In fact, Justice Brennan's footnote even indicated that equal protection would be violated by a state law providing that a domestic corporation could be sued only in its county of residence, but that an out-of-state corporation could be sued in any county in the state "without regard to whether the corporation maintained an agent there . . . ." *Id.* Since *Starnes*, this Court has cited *Saunders* as authority in an equal protection case, confirming that it remains good law. *See Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. at 664-65.

Accordingly, the constellation of this Court's decisions fully supports the principles of *Saunders* that state court venue is subject to equal protection review and that state venue laws may not discriminate arbitrarily against out-of-state corporations. But there is sufficient tension in this Court's decisions to mislead the state courts, and the decision below typifies that confusion.

In this case, *the Montana Supreme Court never even attempted to identify a reasonable basis for the discrimination in the Montana venue statute against non-resident*

corporations. Relying on *Snell*, a dissent in *Saunders*, and Justice Brennan's open footnote in *Starnes*, the court below brushed aside the need to articulate any rational and legitimate basis for the statute's discrimination against out-of-state corporations. App. 9a. Instead, it concentrated on what it found to be the pro-plaintiff policy of the FELA, particularly with respect to the choice of forum. App. 9a-11a. That approach, of course, was entirely misdirected. The discrimination here is not one of plaintiffs versus defendants, or employees versus railroads—it is unequal treatment as between resident corporations and out-of-state corporations. Indeed, under the Montana venue statute, a FELA suit against a railroad resident in Montana could be filed only in the railroad's county of residence, while an identical suit against BN could be brought in any county.[14] Moreover, Montana's general venue statute is applicable to a whole range of civil cases, not only FELA cases.[15] In any event, the FELA provides no support for discrimination in venue against out-of-state railroads.[16] Thus, the court below sidestepped the real equal protection issue in this case.

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[14] This is not a purely hypothetical example. There are several railroads with their principal places of business in Montana, including Montana Rail Link and Rarus Railway.

[15] The holdings below in these FELA actions are consistent with prior decisions of the Montana Supreme Court in non-FELA actions. *See, e.g., Morgen & Oswood Constr. Co. v. United States Fidelity & Guar. Co.*, 167 Mont. 64, 535 P.2d 170 (1975); *Foley v. General Motors Corp.*, 159 Mont. 469, 499 P.2d 774 (1972); *Pue v. Northern Pac. Ry.*, 78 Mont. 40, 252 P. 313 (1926); *State ex rel. Mackey v. District Court, Fifth Dist.*, 40 Mont. 359, 106 P. 1098 (1910).

[16] The FELA itself does not discriminate in venue when an action is brought in federal court. 45 U.S.C. § 56 (1981). In addition, this Court has held that state court actions against FELA defendants should be governed by the same venue rules as all other actions in the state courts, not singled out for different treatment. *See Miles v. Illinois Cent. R.R.*, 315 U.S. 698, 703 (1942). Indeed, a state cannot discriminate between actions arising under a federal law, such as the FELA, and actions arising under state laws. *See McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230, 234 (1934).

The Montana Supreme Court also avoided the issue in other ways. For instance, the court found that there was no truly discriminatory effect in forcing BN to proceed in state court in Yellowstone County, in that the case could have been brought under the FELA in federal district court in Billings, Montana, which is also located in Yellowstone County. App. 15a. This strained analogy to *Starnes* fails. As noted above, the discrimination in the Montana venue statute exists regardless whether the action is under the FELA (or any other federal law providing for concurrent state and federal court jurisdiction). Equally important, the discrimination here subjects BN to extreme forum shopping *within the Montana court system.* The coincidence that the underlying action could also have been brought in federal court is beside the point. The federal court system was designed to minimize the effects of local bias against out-of-state defendants, and contains specific safeguards. Unlike Montana state court judges, who are elected locally for fixed terms of office, federal judges are appointed for life by the President, subject to the advice and consent of the Senate. The jury in federal court is also reflective of a wider geographic region. In the Yellowstone County state trial court, the jury venire is limited to Yellowstone County itself. In contrast, the jury venire for the Billings Division of the United States District Court for the District of Montana is drawn from Yellowstone and twenty-six other nearby counties.[17] In addition, a defendant in federal court has the right of appeal to the United States Court of Appeals for the Ninth Circuit, rather than to the Montana Supreme Court. For all of these reasons, the fortuity of concurrent federal jurisdiction does not alter the prejudice experienced by BN as an out-of-state corporation defending itself within the Montana judicial system.

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[17] D. Mont. R. 105-1 (1991) (specifying five divisions of the court).

Ultimately, the Montana Supreme Court failed to supply any meaningful rationale for the patent discrimination in the Montana venue statute—single county venue for cases against resident corporations, "any county" venue for cases against non-resident corporations. In one sense, that omission should perhaps not be surprising, since the statute was adopted in 1864, before Montana became a state and before passage of the Fourteenth Amendment.[18] The absence of explanation suggests that the statute is the product of nothing more than arbitrary and unwarranted localism. What should be of equal or greater concern to this Court, however, is that in the welter of confusion represented by the decision below, the court felt itself free to avoid even the most rudimentary equal protection review of such a discriminatory state law.

II. MONTANA'S DISCRIMINATION IN VENUE AGAINST NON-RESIDENT CORPORATIONS HAS REAL AND SUBSTANTIAL EFFECTS: IN PARTICULAR, NON-RESIDENT CORPORATIONS ARE SUBJECTED TO OPEN-ENDED FORUM SHOPPING FROM WHICH RESIDENT CORPORATIONS ARE LEGALLY IMMUNE UNDER STATE LAW

Everything about the Montana venue statute—its divided structure, its plain language, and its interpretation in case law—discriminates between domestic and non-resident corporations. Under MCA § 25-2-118, domestic corporations enjoy the privilege of being sued only in their county of selected residence. In contrast, out-of-state corporations may be sued in any county selected by the plaintiff. In the give and take of civil litigation, this inequality has tremendous impact.

This disparate treatment has two types of adverse effects on a multi-state business such as BN. First, the

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[18] The statute was re-worded slightly, without any substantive revision, in 1985. MCA § 25-2-118 (1989) (originally enacted as Sec. 20, p. 46, Bannack Stat., 1864; amended Sec. 8, Ch. 432, L. 1985; redesignated 25-2-118 by Code Commissioner, 1985).

out-of-state corporation must shoulder additional logistical burdens in state court litigation. Non-resident corporations, unlike domestic corporations, are unable to centralize their litigation in their county of residence or where accidents have occurred. In the underlying actions, if BN had been legally "resident" in Montana, it could have insisted on defending itself in its county of Montana headquarters, Hill County. Under such circumstances, BN would have been proceeding in a court to which it has ready and convenient access. As it is, purely because BN is based outside of Montana, it was forced to defend itself in a court in another county designated by the plaintiffs, across the state and nearly two hundred miles away.

Second, and even more important, under the Montana venue system, out-of-state corporations are subjected to open-ended forum shopping, whereas resident corporations are protected from this phenomenon. The quantitative impact of this disparity is heightened by the "open door" policy maintained by Montana.[19] Under the Montana judicial system, an out-of-state corporation may be hauled into court in any Montana county, by an out-of-state plaintiff, represented by out-of-state lawyers, to respond to allegations of an out-of-state injury.[20]

In fact, this is happening in a large number of cases brought against BN in Montana. The two underlying actions by Ford and Johnson are not isolated instances, but instead part of a much larger pattern of plaintiffs' litigation. BN's litigation docket over the period 1986 through the present shows that it is experiencing a torrent of FELA claims in just two Montana state

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[19] *See supra*, at 3-4 & note 3. Under Montana law, the doctrine of forum non conveniens is specifically not available to defendants in FELA actions, as it is to defendants to civil actions arising under state law. MCA § 25-2-201 (1987); *see Haug v. Burlington Northern R.R.*, 236 Mont. 368, 770 P.2d at 521 (citations omitted).

[20] A non-resident corporation can even be sued in a county in which it conducts *no* business.

courts.[21] Furthermore, some significant trends have emerged:

- The great majority of the FELA cases against BN in Montana state court, over 85 percent, have been filed in just two out of Montana's fifty-six counties, Yellowstone and Cascade. Of the total of 140 cases, all but 18 were brought in either Yellowstone County or Cascade County court.
- *Not a single case* filed in Yellowstone or Cascade County involved an alleged accident in the same county in which venue was laid. Furthermore, of the total of 122 cases in those two counties, only 10 were brought by a resident of the county of venue. Thus, over 90 percent of these cases presented no connection whatever to the county of venue.
- Fully ten percent of all of the cases (14 out of 140), have been brought by a plaintiff resident in Hill County, Montana, also alleging an injury in Hill County—the same Hill County in which BN has its principal place of business within Montana. Nonetheless, every one of these cases was filed in Cascade County.
- Many cases present no connection even to Montana. In over one-third of the cases against BN in Montana state court, both the plaintiff and the alleged injury are out-of-state—from Wyoming, Washington, North Dakota, South Dakota, Colorado, and Nebraska. In over 85 percent of those cases, even the plaintiffs' lawyers were from outside of Montana.[22]

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[21] List in the Appendix, at App. 27a, is the entire docket of FELA cases filed against BN in Montana state court, which were resolved (either by judgment or settlement) during the last six years, or which remain pending. Following that list, at App. 40a, is a table laying out salient features of those cases for purposes of this petition.

[22] Of 140 cases, 47 were brought by out-of-state plaintiffs for out-of-state injuries; in turn, of these 47 cases, all but 5 were brought in either Yellowstone or Cascade County district court. Of the total of 47 such cases, lead counsel was from out-of-state in 40 cases.

This data shows that plaintiffs are going out of their way to bring suit in selected Montana counties. In effect, the Yellowstone and Cascade County courts and their juries have become powerful magnets for FELA claims, drawing cases not only from all of Montana but from across the entire upper northwest region of the United States.

From all of the circumstances, it is manifest that BN is being subjected to a virulent form of forum shopping —one from which resident corporations are immunized by state law. The ultimate result of the Montana venue system is a blatant discrimination. The Montana corporation takes the defense with the guarantee of a "home field' advantage, in the county which it has selected as its residence. In contrast, the out-of-state corporation is compelled to defend itself in a court which has been selected by the plaintiff—after a multi-state forum-shopping exercise—as the one in which the largest jury verdict is likely to be obtained. As this case perfectly demonstrates, litigants are skillfully exploiting the discriminatory provisions of the Montana venue statute.

That the discrimination involves "only" the venue of a legal proceeding does not diminish its gravity in the least. Indeed, discrimination in the legal process itself is even more serious than the type of discrimination which may result from arbitrary line-drawing in substantive legislation. The courts, state courts included, are expected to serve as the instruments of substantive justice and as the protectors of constitutional rights. As this Court observed in another equal protection context just last Term:

> [T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds.[23]

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[23] *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087 (1991) (declaring unconstitutional racially discriminatory use of

Discrimination at the courthouse door opens up the possibility of myriad other forms of bias, perhaps subtler but no less real. Thus, inequality in the judicial process, more than in any other branch of government, has a corrosive effect on the rule of law.

Here, litigants are using the discriminatory provisions of Montana law to achieve tactical advantages against non-resident corporations. When discrimination runs against out-of-state litigants, it is especially offensive to our constitutional system. A state should not be permitted to manipulate the opening and closing of its courts so as to confer an advantage to its own corporations over out-of-state businesses. State laws which subject outsiders to unequal treatment invite imitation, or perhaps even worse, retaliation. This Court has not hesitated to strike down state laws, under the Equal Protection Clause, when they discriminate against out-of-state corporations.[24] By close analogy, the Court has

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peremptory jury strikes in civil litigation). This Court also declared last Term that "[t]he Fourteenth Amendment's mandate that race discrimination be eliminated from all acts and proceedings of the State is *most compelling in the judicial system.*" *Powers v. Ohio*, 111 S. Ct. 1364, 1373 (1991) (emphasis added) (race-based use of peremptory jury strikes in criminal case).

[24] *See, e.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 883 (1985) (state law imposing a lower gross premiums tax rate on domestic insurance companies than on foreign insurance companies violates the Equal Protection Clause); *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117, 119-20 (1968) (state law granting a property tax exemption to domestic nonprofit corporations but denying the exemption to foreign nonprofit corporations solely because of their foreign incorporation violates the Equal Protection Clause); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 574 (1949) (foreign corporations were denied equal protection where the state imposed an ad valorem tax on their notes and accounts receivable from sales within the state, but did not impose the same tax on domestic corporations); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 516 (1926) (equal protection violated where state imposed a tax on the net local receipts of foreign corporations at a higher rate than domestic corporations); *Southern Ry. v. Greene*, 216 U.S. 400, 418 (1910) (requiring foreign corporations

also been concerned with the lack of equal protection in state laws which effect disparate treatment as between long-time residents and relative newcomers.[25]

Constitutional law serves as a vital restraint with respect to legislation of this character. A non-resident may be the prime example of someone whose interests should not be entrusted solely to the political processes and judgments of a state legislature.[26] Where political representation is lacking, it is all too easy for state legislators to single out the unrepresented class of persons for disadvantageous treatment.

Accordingly, this case presents an example of real and substantial discrimination against non-residents. Plaintiffs who take out-of-state corporations to court in Montana can take free advantage of idiosyncrasies in the bench and jury venire in selected county courts. In Montana and other states with venue statutes that discriminate against large out-of-state corporations, the result can only be to exacerbate the exploding volume and cost of civil litigation.

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to pay an additional franchise tax that was not required to be paid by domestic corporations violates the Equal Protection Clause).

[25] *See, e.g., Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 911-12 (1986) (prior residence requirement of New York's civil service veterans' preference statute violates equal protection); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 624 (1985) (equal protection violated where statute provided tax exemption only for those Vietnam veterans who were state residents prior to May 1976); *Williams v. Vermont*, 472 U.S. 14, 27 (1985) (state statute granting a use tax credit to automobile registrants only if they were state residents at the time the use tax was paid violated equal protection); *Zobel v. Williams*, 457 U.S. 55, 64-65 (1982) (state statute distributing dividend benefits based upon a recipient's years of residency violates equal protection).

[26] *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (citations omitted); *see* John H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, 82-84 (1980).

III. STATE SUPREME COURTS ARE DIVIDED OVER WHETHER EQUAL PROTECTION IS VIOLATED WHEN A VENUE STATUTE DISCRIMINATES BETWEEN RESIDENT AND NON-RESIDENT CORPORATIONS

Lacking definitive guidance from this Court, state supreme courts remain split as to whether discrimination in state court venue against out-of-state corporations violates equal protection. Many states, of course, do not discriminate. In the dozen or so states in which venue statutes have been challenged as unconstitutionally discriminatory against non-resident corporations, however, the state supreme courts have reached widely divergent results.

Three state supreme courts, relying on this Court's decision in *Saunders*, have struck down state venue laws because of their disparate treatment of resident and non-resident corporate defendants. In 1977, the Arkansas Supreme Court held such a statute unconstitutional. *Philco-Ford Corp. v. Holland*, 548 S.W.2d 828, 829 (Ark. 1977) (citing *Saunders*, subsequent to the *Starnes* decision).[27] Likewise, in *Windham v. Pace*, 6 S.E.2d 270 (S.C. 1939), the South Carolina Supreme Court struck down a venue statute providing that although a domestic motor carrier corporation could be sued only in a county in which it operated, a non-resident motor carrier corporation could be sued in any county in the state. Finding the distinction to be arbitrary, the court observed that "[t]here is no real distinction, we think, between domestic and foreign motor carriers . . . ." *Id.* at 273. Faced with a Kentucky venue statute closely comparable to the one in *Windham*, the Court of Appeals of Kentucky

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[27] The venue statute at issue in *Philco-Ford* was for contract actions; it discriminated between resident and non-resident corporations by providing that while resident corporations could be sued only in their county of residence, non-resident corporations could be sued in any county in which the plaintiff resided.

also declared it unconstitutional. *Henry Fisher Packing Co. v. Mattox*, 90 S.W.2d 70 (Ky. 1936).

Other state supreme courts have recognized but avoided the constitutional issue through statutory construction. As in the case below, these courts were confronted with venue statutes which discriminated against non-resident corporations by permitting a broader choice of forum against them than against resident corporations. Interpreting the applicable state laws, these courts have found that out-of-state corporations may acquire "resident" status, for venue purposes, through acts such as maintaining a place of business in the state and designating an agent for service of process.[28] States falling into this category include California, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Missouri, and North Carolina.[29] Such an interpretation often has been prompted by a desire to avoid a reading of the statute that would risk violating equal protection and this Court's decision in *Saunders*.[30]

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[28] The Montana Supreme Court was invited to take this approach, but declined. App. 5a-6a. Decisions which eliminate the constitutional issue through statutory construction are the true analogy to *Starnes*, in which the statute was discriminatory on its face but no discrimination was found in the actual operation of the statute. If an out-of-state corporation may, through reasonable measures, place itself in the same position as a resident corporation for venue purposes, then no real discrimination will result.

[29] *Banning v. Minidoka Irrig. Dist.*, 406 P.2d 802 (Idaho 1965); *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (Mo. 1962); *Commercial Carriers, Inc. v. Matracia*, 311 S.W.2d 565 (Ky. 1958); *Hale v. Bohannon*, 241 P.2d 4 (Cal. 1952) (en banc); *Smith v. Utah Home Fire Ins. Co.*, 47 N.W.2d 785 (Minn. 1951); *Hill v. Atlantic Greyhound Corp.*, 51 S.E.2d 183 (N.C. 1949); *Forman v. Mississippi Publishers Corp.*, 14 So. 2d 344 (Miss. 1943); *Hirsch v. Shepherd Lumber Corp.*, 20 S.E.2d 575 (Ga. 1942); *Sandford v. Dixie Constr. Co.*, 128 So. 887 (Miss. 1930). *See also Zolper* v. *AT&T Info. Sys., Inc.*, 709 S.W.2d 74 (Ark. 1986) (different statute than the one in *Saunders*).

[30] *See Banning*, 406 P.2d at 804; *Utah Home Fire Ins.*, 47 N.W.2d at 787-88 & n.2; *Hirsch*, 20 S.E.2d at 577; *Sandford*, 128

In effect, then, these states abide by the principles announced by this Court in that case.[31]

Still other state supreme courts, however, like the Montana court, have found no constitutional defect in venue statutes that discriminate between resident and nonresident corporate defendants. Two state supreme courts have upheld venue statutes virtually identical to the Montana statute discriminating against out-of-state corporations.[32] Other state courts have upheld venue statutes which allowed suit against *individual* nonresident defendants in any county designated by the plaintiff, whereas venue against residents was far more restricted.[33]

So. at 889; *see also Zolper*, 709 S.W.2d at 76. In addition, in *Hale v. Bohannon*, the California Supreme Court upheld part of a lower court decision, *Bohn v. Better Biscuits, Inc.*, 78 P.2d 1177, 1180-83 (Cal. Ct. App. 1938), which had interpreted the relevant venue provisions as applying equally to foreign and domestic corporations, expressly due to the equal protection considerations raised in *Saunders*.

[31] Either out of concern for constitutional equal protection, or perhaps for simple reasons of fairness, a number of states with venue statutes like the one presented here also provide *by statute* that an out-of-state corporation may acquire a particular residence for purposes of state court venue. Maine, Me. Rev. Stat. Ann. tit. 4, § 155 (West 1989); Nebraska, Neb. Rev. Stat. § 25-403.02 (1989); and Oregon, Or. Rev. Stat. § 14.080 (1989).

[32] *Commercial Ins. Co. v. Adams*, 366 S.W.2d 801 (Tex. Civ. App.), *aff'd*, 369 S.W.2d 927 (Tex. 1963) (upholding statute providing that despite different treatment of domestic corporations, a foreign corporation may be sued in any county in which it maintains an agent or representative throughout the state). *State ex rel. Blackledge v. Latourette*, 205 P.2d 849 (Or. 1949) (upholding statute providing that for tort actions, resident defendants must be sued in the county where the cause of action arose, or where they reside, but non-resident defendants may be sued anywhere in the state).

[33] *Conner v. Willet*, 91 So. 2d 225 (Ala. 1956) (even though venue against resident individual defendants was restricted, non-resident individual defendants could be sued in any county in the state);

In other cases involving various other forms of venue discrimination against non-residents, courts have also declined to find any equal protection violation.[34] Finally, a number of states have venue laws which have not yet been brought under equal protection scrutiny, but which discriminate on their face in favor of resident and against non-resident corporations.[35]

From the preceding array, two points emerge. First, not only the Montana Supreme Court, but also a number of other state courts, are prepared to condone state venue laws which treat resident and non-resident corporations unequally. Second, state courts on all sides of the ques-

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Alcarese v. Stinger, 78 A.2d 651 (Md. 1951) (although venue against resident individual defendants was restricted, venue against non-resident individual defendants was unrestricted); and *Panzram v. O'Donnell*, 48 F. Supp. 74 (S.D. Minn. 1942) (actions must be brought against resident defendants where they reside, but may be brought against non-residents in any county in the state).

[34] *See, e.g., Aetna Fin. Co. v. Gutierrez*, 632 P.2d 1176 (N.M. 1981) (different treatment afforded foreign and resident corporations in venue statute did not violate equal protection); *Lane v. Hughes*, 408 P.2d 281 (Okla. 1965) (non-resident motorist venue provisions constitutional even though they provide for wider venue against foreign defendants than for resident defendants); *Wilson & Co. v. Hickey*, 97 P.2d 564 (Okla. 1939) (discriminatory treatment against foreign corporation in venue statute held constitutional); *Phillips Petroleum Co. v. Smith*, 61 P.2d 184 (Okla. 1936) (venue statute allowing suit against foreign corporations in more counties than against domestic corporations not unconstitutional).

[35] These states include Alabama, Ala. Code § 6-3-7 (1990); Arizona, Ariz. Rev. Stat. Ann. § 12-401 (West Supp. 1990); Colorado, Colo. R. Civ. P. R. 98 (1990); Florida, Fla. Stat. Ann. § 47.051 (Harrison 1988); Iowa, Iowa Code Ann. § 616.17 (West 1950); New Hampshire, N.H. Rev. Stat. Ann. § 507:9 (1983); Nevada, Nev. Rev. Stat. Ann. § 13.040 (Michie 1987); North Dakota, N.D. Cent. Code § 28-04-04 (1991); Rhode Island, R.I. Gen. Laws §§ 9-4-4, 9-4-5 (1985); South Dakota, S.D. Codified Laws Ann. § 15-5-6 (Supp. 1991); Tennessee, Tenn. Code Ann. § 20-4-106 (1980); Vermont, Vt. Stat. Ann. tit. 12, § 402 (1973); West Virginia, W. Va. Code § 56-1-1 (Supp. 1991); and Wyoming, Wyo. Stat. § 1-5-107 (1991).

tion have found support for their positions in the various decisions of this Court, including *Snell*, *Saunders*, and *Starnes*.[36] The decision below, which in effect treated *Saunders* as having been overruled, is but one example of the disarray. Such a situation, in which controlling Supreme Court authority on a constitutional issue is being disregarded or misapprehended, demands rectification.

As the case law demonstrates, the application of the Equal Protection Clause to matters of state venue law has been permitted to percolate at least since the *Saunders* decision in 1927. At this point, it seems unlikely that the state courts will be able to focus the relevant issues any more clearly. Indeed, if anything, these courts appear to be becoming less certain of themselves in this area—seeming to perceive conflicting results in this Court's past decisions. The state courts therefore appear to be unable consistently to identify the gross discrimination worked by such statutes against out-of-state corporations, or to curb the abusive forum shopping to which this disfavored class of defendants is being subjected.

Because these issues of state venue law almost always arise in the state courts, there is little or no chance that the question presented can be resolved by the federal courts of appeals. Accordingly, it is left to this Court to

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[36] *See* cases cited *supra*, nn. 29, 32-34. Indeed, many state court decisions have seized on only one or two of this Court's decisions in the area, without making any attempt to reconcile the line of cases as a whole. *See, e.g., Kellis v. Farber*, 523 So. 2d 843, 847-48 (La. 1988) (cites *Snell* to the effect that there is no constitutionally protected right to be sued in one forum over another, without citing *Saunders*); *Plantation Legal Defense Servs., Inc. v. O'Brien*, 401 A.2d 1277, 1279 (R.I. 1979) (follows *Snell* in holding that equal protection not violated by choice of forum if "equal laws equally administered," without citing *Saunders*); *State of Wisconsin ex rel. Steeps v. Hanson*, 80 N.W.2d 812, 815 (Wis. 1957) (quotes *Snell* at length as dispositive of equal protection challenge to venue statute, without citing *Saunders*); *see also Smith v. Utah Home Fire Ins. Co.*, 47 N.W.2d at 787-88 (makes equal protection analysis without referring to any Supreme Court precedent).

settle the question conclusively, and to rule that state venue laws may not discriminate in favor of resident corporations and against out-of-state corporations.

CONCLUSION

For these reasons a writ of certiorari should issue and the decision and order of the Supreme Court of the State of Montana should be reversed.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF MONTANA

1991

No. 90-557/90-558

WILLIAM D. FORD,
Plaintiff and Respondent

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation,
Defendant and Appellant,

THOMAS L. JOHNSON,
Plaintiff and Respondent,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation,
Defendant and Appellant

[Filed Aug. 12, 1991]

APPEAL FROM:

District Court of the Thirteenth Judicial District,
In and for the County of Yellowstone,
The Honoroable Russell K. Fillner, Judge presiding;
The Honorable William J. Speare, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

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For Respondent:

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Submitted on Briefs: April 18, 1991

Decided: August 12, 1991

/s/ Ed Smith
Clerk

Justice Terry N. Trieweiler delivered the opinion of the Court.

The plaintiffs, William D. Ford and Thomas L. Johnson, filed separate actions in the District Court for the Thirteenth Judicial District, Yellowstone County, pursuant to the Federal Employers Liability Act found at 45 U.S.C. §§ 51-60. The defendant in both cases, Burlington Northern Railroad Company, moved to transfer venue to Hill County for the reason that that county was its principal place of business in Montana, and therefore, should serve as its residence for purposes of determining proper venue.

In reliance on our decision in *Haug v. Burlington Northern R. Co.* (1989), 236 Mont. 368, 770 P.2d 517, the District Court denied defendant's motion in both cases. From those orders denying defendant's motion for change of venue, defendant appeals. Those cases have been consolidated for purposes of appeal. We affirm the District Court.

Defendant raises the following issue on appeal:

Does § 25-2-118, MCA, as applied by this Court, violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by treating nonresidents, such as defendant, differently than residents for purposes of venue without any rational basis for dissimilar treatment?

FACTUAL BACKGROUND

Plaintiffs are both residents of Sheridan, Wyoming. Johnson alleges in his complaint that he was injured during the course of his employment with defendant on August 22, 1987, while working as a locomotive engineer. Ford alleges in his complaint that he was injured on February 7, 1989, while employed by defendant as a brakeman. Both plaintiffs were injured while working on their employer's premises in Sheridan, Wyoming. Both

have alleged that defendant failed to provide them with a safe place to work at that location.

Defendant is a railroad operating in interstate commerce. It is incorporated in the state of Delaware, and its principal place of business is Fort Worth, Texas. It operates its business in several Montana counties, including Yellowstone County. However, it alleges, and for purposes of this appeal, we will assume that its Montana headquarters are located in Hill County.

Plaintiffs' exclusive remedy for injuries sustained during the course of their employment with the railroad is their claim pursuant to the Federal Employers Liability Act, 45 U.S.C. § 51-60. Section 56 of the Act provides that an action to enforce rights granted by the Act can be brought in either federal or state courts, and establishes venue in those cases where the action is brought in federal court. Section 56 provides in relevant part as follows:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states.

Defendant does not deny that it does business in Yellowstone County, Montana, and that if plaintiffs had chosen the federal district court as their forum, defendant could have been properly sued in the federal district court located in Billings, Montana. Furthermore, section 56 has been the law for over 80 years. Its effect has always been to treat railroads differently than other parties. However, defendant cites no authority holding that it is unconstitutional for that reason.

Defendant objects to the rule by which venue was established in this case under state law.

We apply state law to determine proper venue in this case pursuant to *Miles v. Illinois Central R. Co.* (1942), 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129, in which the U.S. Supreme Court established that rules of venue in FELA actions filed in state courts are properly left to the various states.

In Montana, the general venue statute is § 25-2-118, MCA, which provides as follows:

> Unless otherwise specified in this part:
>
> (1) except as provided in subsection (3), the proper place of trial for all civil actions is the county in which the defendants or any of them may reside at the commencement of the action;
>
> (2) if none of the defendants reside in the state, the proper place of trial is any county the plaintiff designates in the complaint . . . .

In *Haug*, 770 P.2d 517, we held that § 25-2-118, MCA (1989), allowed plaintiffs in FELA actions to sue out-of-state residents, such as defendant, in any county in the state.

We stated:

> From the case history in Montana, we conclude that a plaintiff is entitled to bring a tort action against a non-resident defendant in either the county where the tort occurred or in any county of this state. This Court has consistently held that a foreign corporation has no county of residence for venue purposes and can be sued in any county selected by the plaintiff. *Hanlon v. Great Northern Railway Co.* (1928), 83 Mont. 15, 268 P. 547; *Truck Insurance Exchange v. N.F.U. Property & Casualty Co.* (1967), 149 Mont. 387, 427 P.2d 50; *Foley v. General Motors Corp.* (1972), 159 Mont. 469, 499 P.2d 774. The

> holdings of these cases are consistent with the provisions of § 25-2-118(2), MCA, which in substance states that any county designated by the plaintiff is the proper place of trial if no defendants reside in Montana.

Haug, 770 P.2d at 519.

It is defendant's position that Montana's venue statute, as applied by this Court in *Haug*, discriminates against out-of-state corporations without any apparent justification, and therefore, denies defendant equal protetcion under our state's laws.

DISCUSSION

Although there is some inconsistency in the federal case law, our decision appears to be controlled by a series of U.S. Supreme Court decisions, beginning with *Cincinnati Street Ry. Co. v. Snell* (1904), 193 U.S. 30. In that case, the defendant railroad was sued in the county of its principal place of business. The plaintiff was allowed to transfer venue to an adjoining county based upon a venue statute which permitted transfer where one of the parties was a corporation with more than 50 stockholders, and the action was pending in the county in which the corporation had its principal office or transacted its principal business. It was the defendant's position that equal protection of the laws was denied because an equal opportunity to transfer venue was not conferred on the corporation. The U.S. Supreme Court held that the Fourteenth Amendment does not guarantee citizens the right to have disputes determined in one forum, as opposed to another. It stated:

> As previously shown, the Supreme Court of the State of Ohio pointed out in its opinion that the rights of the parties were governed in the court to which the case was transferred by the same law and the same rules which would have prevailed had the case been

tried in the court in which it was originally brought. And this has not been challenged either by the assignments of error or any of the arguments made to sustain them. The proposition to which the case reduces itself is therefore this: That although the protection of equal laws equally administered has been enjoyed, nevertheless there has been a denial of the equal protection of the law within the purview of the Fourteenth Amendment, only because the State has allowed one person to seek one forum and has not allowed another person, asserted to be in the same class, to seek the same forum, although as to both persons the law has afforded a forum in which the same and equal laws are applicable and administered. But it is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. Given therefore a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the State has deemed best to provide for a trial in one forum or another. It is not under any view the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail.

It follows that the mere direction of the state law that a cause under given circumstances shall be tried in one forum instead of another, or may be transferred when brought from one forum to another, can have no tendency to violate the guarantee of the equal protection of the laws where in both the forums equality of law governs and equality of administration prevails. In *Iowa Central*

Railway Company v. Iowa, 160 U.S. 389, 393, this Court said:

> "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another."

Cincinnati Street Ry. Co., 193 U.S. at 36-37.

It is defendant's position that this issue is controlled by the Supreme Court's decision in *Power Mfg. Co. v. Saunders* (1927), 274 U.S. 490, 47 S.Ct. 678. In that case, the defendant corporation, which was a resident of Ohio, was sued by one of its employees in the state of Arkansas. It was sued in a county other than the county where its principal place of business was located. For that reason, it challenged the Arkansas venue statute which required that actions of that type against a resident corporation be brought in the county where it had a place of business or in which its chief officer resided, but permitted actions against foreign corporations to be brought in any county in the state. In that case, where the defendant did no business and had no office, officer, or agent in the county where suit was brought, the Supreme Court found no rational basis for distinguishing between foreign and domestic corporations, and held that since discriminatory treatment was without a reasonable basis and essentially arbitrary, it violated the Equal Protection Clause of the Fourteenth Amendment.

We find that the *Saunders* case is not controlling for several reasons.

First, *Saunders* is distinguishable on its facts. In that case, the defendant did no business in the county where venue was established. In this case, defendant admittedly does business in Yellowstone County. In *Saunders*, plaintiff's action was brought pursuant to the common law of the state of Arkansas. In this case, plaintiffs' claims are based upon federal statutory law which was designed to provide injured railroad workers with as many options as possible when choosing the venue within which to file their complaint.

Second, the *Saunders* decision did not preclude disparate treatment under a state's venue laws where a rational basis could be shown for such treatment. In fact, when referring to the requirements of the Fourteenth Amendment, that Court stated:

> It does not prevent a State from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not aribtrary but based on a real and substantial difference having a reasonable relation to the subject of that particular legislation.
>
> . . . the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made.

Saunders, 274 U.S. at 493-94 (citations omitted).

Without addressing the greater issue of whether there is a rational basis for treating all out-of-state corporations differently from all domestic corporations, it does appear that there is a commonly accepted historic justification for allowing railroad workers greater flexibility when choosing a forum than other litigants. In *LaBella v. Burlington Northern, Inc.* (1979), 182 Mont. 202, 595 P.2d 1184, we cited the following legislative history for

45 U.S.C. § 56, which would determine venue if plaintiffs had brought their action in federal court.

In a Senate Committee Report, the purpose of the amendment to section 6 H.R. 17263, 61st Cong., 2d Sess. (1910), was said to be:

> ". . . to make entirely manifest the good faith of the legislature in the enactment of the employers liability law, which places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads is appalling . . .
>
> "It was the intention of Congress in the enactment of this law originally and it may be presumed to be the intention of the present Congress to shift the burden of the loss resulting from these casualties from 'those least able to bear it' and place it on those who can . . . 'measurably control their causes'." Sen.Rep.No. 432, 61st Cong., 2d Sess., (1910), 45 Cong.Rec. 4041 (1910).

In reporting the bill out of committee, Senator Borah stated his objection to the law as it existed:

> "Plaintiff may sometimes be compelled to go a great distance in order to have his cause of action against the defendant by reason of the fact that now the action must be brought in the district in which the defendant is an inhabitant . . .
>
> ". . . If this bill should be passed, the law will be remedied in that respect, enabling the plaintiff to bring his action where the cause of action arose or where the defendant may be doing business. The bill enables the plaintiff to find the

> corporation at any point or place where it is actually carrying on business and there lodge his action, if he chooses to do so." 45 Cong.Rec. at 4034-4035 (1910).
>
> The strength of the policy behind section 6 can be further gleaned from Congress' refusal to pass the Jennings Bill in 1947. It would have repealed most of section 6 and limited the forum choices of injured railroad workers to the district where the cause of action arose or where the plaintiff resided. If process could not be served in either of those places, an action could be brought where defendant was doing business. H.R. 1639, 80th Cong., 1st Sess., (1947).

LaBella, 595 P.2d at 1186.

It is clear then that national policy, dating back to 1910, which was intended to address the dangerous working conditions of railroad workers and to facilitate recovery for families of injured workers, favors a policy of allowing railroad workers to sue their employer at any location where the employer does business. That national policy presents a justification for disparate treatment in this case, which was not present in the *Saunders* case.

Finally, subsequent decisions by the U.S. Supreme Court raise a question about whether *Saunders* continues to be good law.

Initially, *Saunders* was not a unanimous opinion. Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, dissented from the majority opinion. He argued that:

> A foreign corporation merely doing business in the State and having its work elsewhere will be more or less inconvenienced anywhere away from its headquarters, but the difference to it between one

> county and another is likely to be less than it will be to a corporation having its headquarters in the State. So I repeat that in my opinion the plaintiff in error cannot complain if the State holds it liable to a transitory action wherever it may be served and sued, as it would have been liable at common law.

Saunders, 274 U.S. at 498.

Not long after the *Saunders* decision, Mr. Justice Holmes wrote for the majority in *Bain Peanut Co. v. Pinson* (1931) 282 U.S. 499, when the Supreme Court denied a challenge to a Texas venue statute based on the Equal Protection Clause.

In *Bain Peanut Co.*, the Texas venue statute being challenged allowed plaintiffs to sue a private corporation in the county where an action arose, but limited suits against unincorporated individuals to the county in which they were domiciled. The defendant corporation challenged that disparate treatment as a violation of the Equal Protection Clause of the Fourteenth Amendment. In denying the defendant's challenge, Justice Holmes, now writing for the majority, indicated that that Court's prior decision in *Cincinnati Street Ry. Co.*, was still controlling. The court held as follows:

> Coming then to the merits, we are of the opinion that the judgment was right. The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints. In deciding whether a corporation is denied the equal protection of the laws when its creator establishes a more extensive venue for actions against it than is fixed for private citizens, we have to consider, not a geometrical equation between a corporation and a man, but whether the difference does injustice to the class generally, even though it bear hard in some particular case, which

> is not alleged or proved here. *Louisville & Nashville R. Co. v. Barber Asphalt Paving Co.*, 197 U.S. 430, 434. *Patsone v. Pennsylvania*, 232 U.S. 138, 144. This it is for the corporation to make out. The range of the State's discretion is large. *Armour & Co. v. North Dakota*, 240 U.S. 510, 516, 517. The question seems to be answered by *Cincinnati Street Ry. Co. v. Snell*, 193 U.S. 30, 36, 37, which lays down that, if the protection of fundamental rights by equal laws equally administered is enjoyed, the Constitution does not forbid allowing one person to seek a forum from which another in the same class is excluded.

Bain Peanut Co., 282 U.S. at 501.

More recently, in *American Motorist Ins. Co. v. Starnes* (1976), 425 U.S. 637, 96 S.Ct. 1800, 48 L.Ed.2d 263, *Cincinnati Street Ry. Co.* was again cited by the U.S. Supreme Court with approval. In *Starnes*, the defendant, an out-of-state corporation, challenged Texas' venue statutes which treated domestic and foreign corporations differently. Domestic corporations had to be sued in the county in which they were domiciled unless plaintiff, at a preliminary hearing, could prove by a preponderance of the evidence that he had a cause of action. Foreign corporations could be sued in counties other than their Texas domicile without a similar procedural requirement. The defendant challenged the disparate treatment on the grounds that it constituted invidious discrimination against foreign corporations in violation of the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court denied defendant's challenge to the Texas venue statutes for the reason that as a practical matter there was no appreciable advantage for domestic corporations. The Supreme Court arrived at this conclusion after reviewing Texas case law which suggested that providing a prima facie case was sufficient and the venue proceedings against domestic corporations were usually

truncated. In arriving at its decision, the Supreme Court cited with approval language from *Cincinnati Street Ry. Co.*, which is set forth above. However, in language relevant to this decision, that Court also stated:

> We are not confined to the language of the statute under challenge in determining whether that statute has any discriminatory effect. Just as a statute nondiscriminatory on its face may be grossly discriminatory in its operation, *Williams v. Illinois*, 399 U.S. 235, 242 (1970); *Griffin v. Illinois*, 351 U.S. 12, 17 n. 11 (1956), so may a statute discriminatory on its face be nondiscriminatory in its operation. There being no discriminatory effect achieved by the aspects of the Texas venue provisions calling for establishment of a cause of action, we have no difficulty in concluding that appellant's equal protection challenge to the Exception 27 must be rejected.

Starnes, 425 U.S. at 645.

In a footnote to the above statement, the majority noted:

> [6] Our conclusion makes unnecessary consideration of appellant's argument that *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927), requires invalidation of Exception 27. Though more recent decisions raise the question whether *Saunders* continues to be good law, *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Metropolitan Cas. Ins. Co. v. Brownell*, 294 U.S. 580 (1935); *Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1931), as appellant argues, the Court in *Saunders* did conclude that the venue statute involved there treated foreign corporations without reasonable basis and arbitrarily.

Mr. Chief Justice Burger, with whom Mr. Justice Rehnquist concurred, would have denied the defendant's challenge to the Texas venue statute simply on the basis of *Cincinnati Street Ry. Co.* and *Bain Peanut Co.*

Likewise, in this case the statute which is challenged by defendant is nondiscriminatory in its operation. The practical effect of our venue statute in this case is that defendant is required to defend itself in Yellowstone County, Montana—a location where it could admittedly be required to appear and defend itself against the same claim, had plaintiffs chosen to sue it in federal district court.

For all of the above reasons, we affirm the orders of the District Court, and hold that § 25-2-118, MCA (1989), as applied by this Court in *Haug* does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

As in *Haug*, our decision is based on the facts in this case, and in particular, the strong national policy favoring a plaintiff's selection of forum in actions brought under the Federal Employers Liability Act.

We affirm the denial of defendant's motion for a change of venue.

/s/ [Illegible]
Justice

We concur:

/s/ J. A. Turnage
Chief Justice

/s/ John Conway Harrison

/s/ Karla M. Gray

/s/ William E. Hunt, Sr.

/s/ R. C. McDonough

/s/ [Illegible]
Justices

APPENDIX B

MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT, YELLOWSTONE COUNTY

No. DV 89-975

Judge William J. Speare

THOMAS L. JOHNSON,
Plaintiff,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
A Delaware corporation,
Defendant.

ORDER

Presently pending before the Court is Defendant's Motion for Change of Venue. Notification of a constitutional challenge was mailed to the Attorney General of the State of Montana on August 2, 1990. The Court having received no response from the Attorney General deems any objection waived. The Court has reviewed the briefs and other supporting documents filed herein and is now prepared to rule.

BN is a foreign corporation organized under the laws of Delaware, with its principle place of business in Fort Worth, Texas. BN operates rail lines across Montana, including Yellowstone County.

Johnson filed the present action in Yellowstone County. Inasmuch that BN is not a resident of Montana, Yellowstone County as the county designated by the Plaintiff in the Complaint is the proper place for trial. MCA § 25-2-

118(2). Accordingly, Defendant's Motion for Change of Venue is DENIED.

Secondly, BN challenges the constitutionality of the venue statute provides in MCA § 25-2-118 on the grounds that it violates the equal protection clause of the 14th Amendment of the United States Constitution.

The statute is presumed to be valid and its constitutionality will not be condemned unless its invalidity is shown beyond a reasonable doubt. *State vs. Cunningham*, 39 Mont. 137, 103 P.497 (1909).

Therefore, BN bears the burden of establishing beyond a reasonable doubt that MCA § 25-2-118 violates the equal protection clause of the 14th Amendment.

In essense BN argues that similar classifications of corporations are receiving dissimilar treatment for litigation purposes under the current venue statutes.

However, under § 25-2-118, all railroads incorporated in other states and doing business in Montana are treated similarly and can be sued in any county the Plaintiff choses. Thus, BN has failed to establish beyond a reasonable doubt that MCA § 25-2-118 violates the equal protection clause.

Based on the foregoing, Defendant's Motion for Change of Venue is DENIED.

DATED and SIGNED this 21 day of Sept., 1990

/s/ William J. Speare
WILLIAM J. SPEARE
District Judge

cc: Robert S. Fain, Jr.
Gary K. Wood
Russell K. Yerger

APPENDIX C

MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT, YELLOWSTONE COUNTY

Cause No. DV-89-974

WILLIAM D. FORD,
Plaintiff

vs

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware Corporation,
Defendant

ORDER AND MEMORANDUM

This matter came before the Court on the motion of the defendant for change of venue. The parties have filed their briefs in support and opposition thereto. Notification of a constitutional challenge was mailed to the Montana Attorney General on May 5, 1990. The Court having received no response from the Attorney General deems any objection waived. The Court having carefully considered the briefs of counsel, now determines that the defendant's motion for change of venue must be denied for the reasons set forth in the following Memorandum.

Now, therefore;

IT IS ORDERED that the defendant's motion for change of venue is denied.

DATED this 7th September, 1990.

/s/ Russell K. Fillner
RUSSELL K. FILLNER
District Judge

MEMORANDUM

Defendant Burlington Northern Railroad Company (BN) has requested a change of place of trial to Hill County, Montana, on the grounds that Hill County is BN's "principal place of business in Montana." In addition, BN asserts that Montana's venue statutes (Title 25, chapter 2, part 1 MCA) are unconstitutional in that said statutes, as interpreted and applied by the Montana Supreme Court, discriminate against foreign corporations in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

FACTS

William D. Ford (hereinafter Ford) has brought this action against BN to recover for injuries received at a roundhouse in Sheridan Wyoming while in the course of his employment with BN. The action is brought to recover damages pursuant to the Federal Employees Labor Act (FELA).

BN is a foreign corporation organized under the laws of Delaware, with its principle place of business in Fort Worth, Texas. BN operates rail lines across Montana, including Yellowstone County.

DISCUSSION

ISSUE: Does the Montana venue statute, section 25-2-118 MCA, pass constitutional muster as it applies to non-resident defendants in a FELA action?

Section 6 of the FELA, 45 USC Section 56 provides:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the

cause of action arose, or *in which the defendant shall be doing business* at the time of commencing such action. *The jurisdiction of the courts shall be concurrent with that of the courts of the several States.* (emphasis supplied).

Thus, under the FELA an injured railroad worker may file suit in either federal or state court. Accordingly, Ford has properly brought his action in state court.

Furthermore, in FELA actions filed in state court, the United States Supreme Court has held that venue is properly left to the practice of the forum. *Miles v. Illinois Central Railroad*, 315 U.S. 698, 703, 62 S. Ct. 827, 830 (1942). Therefore, the pertinent Montana venue statutes provide:

MCA Section 25-2-118, Residence of the defendant.

Unless otherwise specified in this part:

(1) except as provided in subsection (3), the proper place for trial for all civil actions is the county in which the defendants or any of them reside at the commencement of the action;

(2) if none of the defendants reside in the state, the proper place of trial is the county the plaintiff designates in the complaint;

(3) the proper place for trial of an action brought pursuant to Title 40, chapter 4, is the county in which the petitioner has resided during the 90 days preceding the commencement of the action.

MCA 25-2-115, Multiple proper counties.

If this part designates more than one county as a proper place of trial for any action, an action brought in any such county is brought in a proper county and no motion may be granted to change the place of trial upon the ground that the action is not

> brought in a proper county under 25-2-201(1). If an action is brought in a county not designated as the proper place of trial, a defendant may move for a change of place of trial to any of the designated counties.

The Montana Supreme Court in *Haug v. Burlington Northern R. Co.*, 770 P.2d. 516 (1989) addressed the identical issue provided above and stated:

> This Court has consistently held that a foreign corporation has no county of residence for venue purposes and can be sued in any county selected by the plaintiff. *Hanlon v. Great Northern Railway Co.* (1928), 83 Mont. 15, 268 P. 547; *Truck Insurance Exchange v. N.F.U. Property and Casualty Co.* (1967), 149 Mont. 387, 427 P.2d 50; *Foley v. General Motors Corp.* (1972), 159 Mont. 469, 499 P.2d 774. The holdings of these cases are consistent with the provisions of Section 25-2-118(2), M.C.A. which in substance states that any county designated by the plaintiff is the proper place of trial if no defendants reside in Montana.

Ford's action brought in Yellowstone County is clearly proper as BN is not a resident of Montana and therefore, pursuant to Section 25-2-118(2) cited above a proper place for trial is the county designated by the plaintiff in the complaint.

Section 25-2-201 MCA states:

> *When change of venue required.*
>
> The Court or judge must, on motion change the place of trial in the following cases:
>
> (1) When the county designated in the complaint is not the proper county;

Accordingly, since Yellowstone County is a proper place for trial, the defendants motion to change place of trial

to Hill County is denied pursuant to 25-2-201 MCA. Similarly, the Montana Supreme Court in *Haug* further stated:

> While it can be said that our venue statutes dictate the "practice" of our forum, we are concerned with certain policies set forth in previous FELA cases in determining our forum practice. Specifically, this Court has stated that the FELA is to be given liberal construction in favor of the injured railroad employees so that it may accomplish humanitarian and remedial purposes, following the policy set forth by the United States Supreme Court in *Urie v. Thompson* (1949), 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282. See *State ex rel Burlington Northern Railroad Co. v. District Court* (Mont 1987), 746 P.2d 1077, 44 St.Rep. 2003; *Bevacqua v. Burlington Northern, Inc.* (1979), 182 Mont. 202, 595 P.2d. 1184.
>
> The open door policy expressed in those cases is followed in this opinion. We hold that the plaintiffs in this case were entitled to bring their FELA actions in either the county where the injury occurred, or in any county in this State. Since they have correctly done so, the defendant BN is not entitled to a change of venue under Section 25-2-201.

Secondly, BN attacks the constitutionality of the venue statute provided in Section 25-2-118 MCA on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. BN argues that out of state corporations are discriminated against because they can be sued in any county the plaintiff chooses while corporations who reside in Montana can only be sued in the county of their residence. BN argues the proper venue for this action should be Hill County as this is the county they have chosen as their "principal place of business in Montana".

It has long been law in Montana that a statute is presumed to be valid and its constitutionality will not be condemned unless its invalidity is shown beyond reasonable doubt. *State v. Cunningham* 39 Mont. 197, 103 P. 497, (1909). In light of the foregoing standard, the venue statute is presumed to be valid. Therefore, BN must meet the burden of establishing it violates the Equal Protection Clause of the Fourteenth Amendment beyond a reasonable doubt.

In essence BN argues that similar classifications of corporations are receiving dissimilar treatment for litigation purposes under the current venue statutes. The Montana Supreme Court in the case of *State v. Loomis*, 75 Mont. 88, 242 P. 2d. 344 (1925) stated:

> It is conceded, as it must be, that it is competent for the lawmakers to classify subjects of legislation and to deal differently with the different classes created, if the classification is reasonable and not a mere artificial arrangement or subterfuge to avoid inhibition of the Fourteenth Amendment to the federal Constitution. Whether the classification made by the amended Act is reasonable was a matter for legislative determination in the first instance and every reasonable presumption will be indulged in favor of the validity of the Act; in other words, it will be presumed that the classification is reasonable, the defendant must assume the burden of showing that there is not any admissible hypothesis upon which it can be justified.
>
> We enter upon our investigation with this principle in mind: It is not necessary that the classification depend "on scientific or marked differences in things or persons or in their relations." It suffices if it is practical, and it is not reviewable unless palpably arbitrary. (citations omitted.)

Taking into considerations the nature of the hazardous conditions surrounding the railroad industry as well as the fact that an out of state corporation is coming into the state of Montana to do business, the legislatures dissimilar classification is presumed to be reasonable as it is practical and not palpably arbitrary. Therefore, the classification is not reviewable unless the defendant can show that there is no admissible hypothesis upon which it can be justified.

This is not a case of similar corporations receiving unequal treatment, but instead a case of corporations classified as dissimilar, receiving dissimilar treatment. All members of the class are treated the same. All railroads incorporated in other states and doing business in Montana are treated similarly and can be sued in any county the plaintiff chooses.

Finally, the constitutionality of the venue provision in Section 6 of the FELA, as it applies to venue in federal district court, is presumed constitutional in that research has not disclosed any cases in which the constitutionality of this provisions of the act has been questioned. It would be an anomaly to hold unconstitutional the Montana venue statute which provides, in this case, for the same venue as provided for in the venue provision of FELA. As noted above in *Miles v. Illinois Central Railroad*, 315 U.S. 698, 703, 62 S. Ct. 827, 830 (1942), the United States Supreme Court held the venue statutes in the state of the forum govern not the venue provisions of FELA.

Similarly, the Court of Civil Appeals of Texas in *Hopmann v. Southern Pacific Transport Co.*, 581 S.W. 2d 532 (1979) held constitutional the provisions of its state venue statute which limited venue in a FELA action filed in state court to the county in which the plaintiff resides or the county in which he was injured rather than the options provided by FELA. The *Hopmann*

Court based its decision on the fact that FELA gives the plaintiff choice of federal or state court and when state court is selected as the forum the state venue statutes govern. Accordingly, it would appear that the BN's complaint is more properly addressed to the legislature.

It is undisputed that BN is a foreign corporation with no residence in Montana. Pursuant to FELA, Ford chose to file this action in state court. Therefore, the Montana venue statutes govern and the action is properly brought in the county the plaintiff has selected.

Accordingly, BN's motion to change the place of trial is denied.

DATED this 7th day of September, 1990.

/s/ Russell K. Fillner
RUSSELL K. FILLNER
District Court

APPENDIX D

STATUTE INVOLVED

Montana Code Annotated § 25-2-118

25-2-118. Residence of defendant. Unless otherwise specified in this part:

(1) except as provided in subsection (3), the proper place of trial for all civil actions is the county in which the defendants or any of them may reside at the commencement of the action;

(2) if none of the defendants reside in the state, the proper place of trial is any county the plaintiff designates in the complaint;

(3) the proper place of trial of an action brought pursuant to Title 40, chapter 4 [domestic relations proceedings], is the county in which the petitioner has resided during the 90 days proceding the commencement of the action.

APPENDIX E

FEDERAL EMPLOYEES LIABILITY ACT CASES AGAINST BURLINGTON NORTHERN RAILROAD IN MONTANA STATE COURT, 1986-1991

Akins v. BN, No. BDV-91-599 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Washington; accident in Spokane, Washington) (pending).

Ament v. BN, No. 89-C-323 (Mont. Dist. Ct. Silver Bow Cnty.) (plaintiff resident of Missoula County, Montana; accident in Liberty County) (disposed of in 1990).

Amsk v. BN, No. CDV-90-764 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Park County, Montana; accident in Yellowstone County) (pending).

Amsk v. BN, No. ADV-91-226 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Dawson County, Montana; accident in Dawson County) (pending).

Anderson v. BN, No. BDV-81-179 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accident in Hill County) (disposed of in 1986).

Anderson v. BN, No. CDV-89-813 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of South Dakota; accident in Edgemont, South Dakota) (pending).

Averill v. BN, No. 85-C-200 (Mont. Dist. Ct. Silver Bow Cnty.) (plaintiff resident of Wyoming; accident in Arvada, Wyoming) (disposed of in 1987).

Bardon v. BN, No. ADV-89-365 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Rosebud County, Montana; accident in Rosebud County) (disposed of in 1990).

Bear v. BN, No. CV-81-123-M (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Glacier County, Montana; accident in Glacier County) (disposed of in 1986).

Beatson v. BN, No. CDV-87-651 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Valley County, Montana; accident in Roosevelt County) (disposed of in 1988).

Belden v. BN, No. CDV-90-846 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Wyoming; accident in Bill, Wyoming) (pending).

Belden v. BN, No. ADV-90-847 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Wyoming; accident in Sheridan, Wyoming) (pending).

Belden v. BN, No. ADV-90-847 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Wyoming; accident in Big Horn County) (pending).

Bennett v. BN, No. DV-90-0925 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident in Hines, Wyoming) (disposed of in 1991).

Berumen v. BN, No. DV-88-029 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Yellowstone County, Montana; accident in Donkey Creek, Wyoming) (disposed of in 1990).

Berumen v. BN, No. ADV-89-528 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Wyoming; accident in Nacco Junction, Wyoming) (disposed of in 1990).

Beto v. BN, No. ADV-91-929 (Mont. Cir. Ct. Cascade Cnty.) (plaintiff resident of Phillips County, Montana; accident in Hill County) (pending).

Bilger v. BN, No. BDV-89-555 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Blaine County, Montana; accident in Blaine County) (disposed of in 1990).

Blanchette v. BN, No. BDV-90-867 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Dawson County, Montana; accident in Rosebud County) (pending).

Borst v. BN, No. BDV-89-364 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accident in Hill County) (disposed of in 1991).

Bowles v. BN, No. CDV-91-869 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Dawson County, Montana; accident in Custer County) (pending).

Brakstad v. BN, No. BDV-89-404 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Cascade County, Montana; accident in Fergus County) (pending).

Brinkman v. BN, No. BDV-91-367 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Cascade County, Montana; accident in Fergus County) (pending).

Bronder v. BN, No. ADV-86-1048 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Blaine County, Montana; accident in Hill County) (disposed of in 1989).

Brown v. BN, No. ADV-89-1238 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Wyoming; accident in Sheridan, Wyoming) (disposed of in 1991).

Cardinal v. BN, No. CDV-88-492 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Washington; accident in Kettle Falls, Washington) (disposed of in 1989).

Carrasco v. BN, No. 86-C-420 (Mont. Dist. Ct. Silver Bow Cnty.) (plaintiff resident of Yellowstone County, Montana; accident in Yellowstone County) (disposed of in 1988).

Cheney v. BN, No. 86-319 (Mont. Dist. Ct. Park Cnty.) (plaintiff resident of Wyoming; accident in Parkman, Wyoming) (disposed of in 1989).

Cislo v. BN, No. CDV-87-1242 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Cascade County, Montana; accident in Fergus County) (disposed of in 1989).

Clemens v. BN, No. DV-91-1135 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident in Ulm, Wyoming) (pending).

Comer v. BN, No. ADV-90-202 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Dawson County, Montana; accident in Dawson County) (pending).

Corcoran v. BN, No. DV-85-012 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accident in Roosevelt County) (disposed of in 1987).

Cote v. BN, No. CDV-91-656 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Flathead County, Montana; accident in Glacier County) (pending).

Cottrell v. BN, No. BDV-91-197 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accident in Hill County) (pending).

Counts v. BN, No. ADV-90-105 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Nebraska; accident in Alliance, Nebraska) (disposed of in 1991).

Deluna v. BN, No. DV-89-748 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident in Sully Springs, North Dakota) (disposed of in 1991).

Deshner v. BN, No. ADV-90-765 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Cascade County, Montana; accident in Hill County) (pending).

Dickerson v. BN, No. CDV-90-620 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Nebraska; accident in Bill, Wyoming) (disposed of in 1991).

Dietel v. BN, No. BDV-84-1076 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Washington; accident in Yardley, Washington) (closed).

Douglas v. BN, No. CDV-89-1195 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Wyoming; accident in Sheridan, Wyoming) (disposed of in 1991).

Doyle v. BN, No. DV-91-1141 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident in Verona, Wyoming).

Easley v. BN, No. DV-86-795 (Mont. Dist. Ct. Gallatin Cnty.) (plaintiff resident of Gallatin County, Montana; accident in Powell County) (disposed of in 1988).

Edeler v. BN, No. DV-88-167 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident in Norland, Wyoming) (disposed of in 1989).

Engleman v. BN, No. BDV-91-832 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accidents in Phillips, Flathead and Glacier Counties) (pending).

English v. BN, No. CDV-89-397 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accident in Hill County) (disposed of in 1990).

Epple v. BN, No. DV-87-102 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident in Gillette, Wyoming) (disposed of in 1989).

Erickson v. BN, No. DV-88-1029 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident in Lariat, Wyoming) (disposed of in 1990).

Ericson v. BN, No. BDV-89-326 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Washington; accident in Spokane, Washington) (disposed of in 1990).

Faxon v. BN, No. DV-90-0927 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident in Antelope, Wyoming) (disposed of in 1991).

Ford v. BN, No. DV-89-974 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident in Sheridan, Wyoming) (pending).

Frank v. BN, No. CDV-87-704 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Lewis and Clark County, Montana; accident in Lewis and Clark County) (disposed of in 1988).

Fuller v. BN, No. ADV-88-1100 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Flathead County, Montana; accident in Flathead County) (pending).

Gallery v. BN, No. CDV-91-761 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Flathead County, Montana; accident in Flathead County) (pending).

Gendrow v. BN, No. CDV-91-300 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Flathead County, Montana; accident in Flathead County) (pending).

Gilliland v. BN, No. ADV-88-991 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Flathead County, Montana; accident in Flathead County) (disposed of in 1990).

Graham v. BN, No. CDV-91-301 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Missoula County, Montana; accident in Flathead County) (pending).

Gummer v. BN, No. ADV-91-760 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accident in Hill County) (pending).

Hammer v. BN, No. CDV-90-595 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Yellowstone County, Montana; accident in Sweet Grass County) (disposed of in 1991).

Harms v. BN, No. BDV-86-1000 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Park County, Montana; accident in Gallatin County) (disposed of in 1989).

Harrod v. BN, No. DV-88-1657 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident in Sheridan, Wyoming) (disposed of in 1991).

Hattenburg v. BN, No. BDV-89-582 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Washington; accident in Odessa, Washington) (disposed of in 1990).

Haug v. BN, No. CDV-88-463 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Park County, Montana; accident in Park County) (disposed of in 1991).

Hayes v. BN, No. ADV-85-819 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Park County, Montana; accident in Warren, Wyoming) (disposed of in 1988).

Healy v. BN, No. DV-88-1160 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of South Dakota; accident in New Castle, Wyoming) (disposed of in 1989).

Henderson v. BN, No. BDV-89-630 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; acident in Hill County) (disposed of in 1990).

Hernandez v. BN, No. CDV-89-483 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Wyoming; accident in Minnesela, Wyoming) (disposed of in 1991).

Hertsgaard v. BN, No. BDV-90-615 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accident in Hill County) (disposed of in 1991).

Hertsgaard v. BN, No. BVD-91-368 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accident in Hill County) (pending).

Hitchcock v. BN, No. DV-88-1076 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident in Casper, Wyoming) (disposed of in 1989).

Hobby v. BN, No. BDV-85-1448 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Valley County, Montana; accident in Valley County) (disposed of in 1987).

Hoffman v. BN, No. CDV-89-642 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of North Dakota; accident in West Fargo, North Dakota) (disposed of in 1990).

Hofmeister v. BN, No. DV-88-229 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident Elkhorn, Wyoming) (disposed of in 1989).

Horton v. BN, No. DV-87-768 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Carbon County, Montana; accident in Parkman, Wyoming) (disposed of in 1989).

Houser v. BN, No. ADV-86-1176 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Colorado; accident in Broomfield, Colorado) (disposed of in 1988).

Ivers v. BN, No. BDV-91-926 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Flathead County, Montana; accident in Flathead County) (pending).

Jeanneret v. BN, No. 82-C-458 (Mont. Dist. Ct. Silver Bow Cnty.) (plaintiff resident of Washington; accident in Parkwater, Washington) (disposed of in 1986).

Jennings v. BN, No. BDV-87-1363 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accident in Hill County) (disposed of in 1989).

Johnson v. BN, No. BDV-87-658 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Nebraska; accident in Alliance, Nebraska) (disposed of in 1988).

Johnson v. BN, No. DV-89-975 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident in Sheridan, Wyoming) (pending).

Johnson v. BN, No. CDV-90-218 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of North Dakota; accident in Dawson County) (pending).

Jolley v. BN, No. ADV-89-1235 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Wyoming; accident in Parkman, Wyoming) (pending).

Jurenic v. BN, No. 88-C-42 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Silver Bow County, Montana; accident in Sweet Grass County) (disposed of in 1988).

Kalanick v. BN, No. ADV-87-1222 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accident in Hill County) (disposed of in 1990).

Keller v. BN, No. BDV-89-010 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of South Dakota; accident in Prairie County) (disposed of in 1990).

Kincaid v. BN, No. CDV-85-924 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Cascade County, Montana; accident in Toole County) (disposed of in 1987).

Knutson v. BN, No. BDV-87-1739 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accident in Flathead County) (disposed of in 1988).

Kobielusz v. BN, No. CDV-89-1236 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Wyoming; accident in Sheridan, Wyoming) (disposed of in 1991).

Lambert v. BN, No. CDV-85-958 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Valley County, Montana; accident in Valley County) (disposed of in 1987).

Lasalle v. BN, No. CDV-90-1114 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Chouteau County, Montana; accident in Hill County) (pending).

Lasalle v. BN, No. CDV-91-930 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Chouteau County, Montana; accident in Hill County) (pending).

Lay v. BN, No. BDV-88-045 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Lewis and Clark County, Montana; accident in Lewis and Clark County) (disposed of in 1989).

Lemire v. BN, No. DV-87-1667 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accident in Lewis and Clark County) (disposed of in 1988).

Liese v. BN, No. CDV-89-511 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accident in Hill County) (disposed of in 1991).

Lodinoff v. BN, No. CDV-85-1445 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Flathead County, Montana; accident in Flathead County (disposed of in 1986).

Luoma v. BN, No. DV-88-1267 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident in Lovell, Wyoming) (disposed of in 1989).

Marmon v. BN, No. ADV-88-749 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Valley County, Montana; accident in Roosevelt County) (disposed of in 1990).

McClintock v. BN, No. 62195 (Mont. Dist. Ct. Missoula Cnty.) (plaintiff resident of Missoula County, Montana; accident in Flathead County) (disposed of in 1987).

McFall v. BN, No. DV-90-0926 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident in Casper, Wyoming) (pending).

Meeker v. BN, No. BDV-89-1237 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Wyoming; accident in Sheridan, Wyoming) (disposed of in 1991).

Miller v. BN, No. CDV-88-992 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accident in Hill County) (disposed of in 1989).

Misevic v. BN, No. 90-C-68 (Mont. Dist. Ct. Silver Bow Cnty.) (plaintiff resident of Missoula County, Montana; accident in Lewis and Clark County) (pending).

Mitchell v. BN, No. ADV-90-079 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Yellowstone County, Montana; accident in Yellowstone County) (disposed of in 1991).

Mogen v. BN, No. ADV-89-165 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Rosebud County, Montana; accident in Rosebud County) (disposed of in 1990).

Mueller v. BN, No. CV-87-164 (Mont. Dist. Ct. Park Cnty.) (plaintiff resident of Yellowstone County, Montana; accident in Yellowstone County) (disposed of in 1989).

Nelson v. BN, No. 87-262 (Mont. Dist. Ct. Park Cnty.) (plaintiff resident of Gallatin County, Montana; accident in Stillwater County) (disposed of in 1990).

Nelson v. BN, No. BDV-89-318 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Mineral County, Montana; accident in Flathead County) (disposed of in 1991).

Oblizalo v. BN, No. CDV-89-477 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Yellowstone County, Montana; accident in Park County) (pending).

O'Brien v. BN, No. BDV-86-1319 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Washington; accident in Spokane, Washington) (disposed of in 1988).

Olsen v. BN, No. BDV-86-1174 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Cascade County, Montana; accident in Missoula County) (disposed of in 1988).

Olson v. BN, No. BDV-84-106 (Mont. Dist. Ct. Deer Lodge Cnty.) (plaintiff resident of Park County, Montana; accident in Park County) (disposed of in 1987).

Olson v. BN, No. BDV-90-146 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Cascade County, Montana; accident in Flathead County) (disposed of in 1991).

Omvig v. BN, No. ADV-88-960 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Valley County, Montana; accident in Valley County) (disposed of in 1989).

Paul v. BN, No. 90-C-217 (Mont. Dist. Ct. Silver Bow Cnty.) (plaintiff resident of Flathead County, Montana; accident in Flathead County) (disposed of in 1991).

Peccia v. BN, No. DV-88-1064 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident in Bill, Wyoming) (disposed of in 1989).

Peuneeard v. BN, No. ADV-88-816 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Flathead County, Montana; accident in Flathead County) (disposed of in 1991).

Pepos v. BN, No. BDV-91-222 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Cascade County, Montana; accident in Powell County) (pending).

Phillips v. BN, No. ADV-88-009 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Park County, Montana; accident in Park County) (disposed of in 1989).

Plouffe v. BN, No. BDV-81-278 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Blaine County, Montana; accident in Hill County) (disposed of in 1987).

Reister v. BN, No. DV-87-944 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Lewis and Clark County, Montana; accident in Broadwater County) (disposed of in 1988).

Rice v. BN, No. 62879 (Mont. Dist. Ct. Missoula Cnty.) (plaintiff resident of Missoula County, Montana; accident in Yellowstone County) (disposed of in 1987).

Richard v. BN, No. CDV-88-1101 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accident in Hill County) (disposed of in 1990).

Rieck v. BN, No. ADV-89-352 (Mont. Dist Ct. Cascade Cnty.) (plaintiff resident of Wyoming; accident in Sage Creek, Wyoming) (disposed of in 1990).

Robbins v. BN, No. 66781 (Mont. Dist. Ct. Missoula Cnty.) (plaintiff resident of Flathead County, Montana; accident in Flathead County) (disposed of in 1987).

Roseburg v. BN, No. BDV-87-072 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Glacier County, Montana; accident in Glacier County) (disposed of in 1989).

Sadowsky v. BN, No. ADV-91-390 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Dawson County, Montana; accident in Dawson County) (pending).

Sams v. BN, No. DV-87-161 (Mont. Dist. Ct. Yellowstone Cnty.) (plaintiff resident of Wyoming; accident in Gillette, Wyoming) (disposed of in 1989).

Scott v. BN, No. CV-88-C-137 (Mont. Dist. Ct. Silver Bow Cnty.) (plaintiff resident of Washington; accident in Spokane, Washington) (disposed of in 1990).

Scott v. BN, No. BDV-90-1182 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Cascade County, Montana; accident in Toole County) (pending).

Seibel v. BN, No. CRV-90-1124 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Lewis and Clark County, Montana; accident in Lewis and Clark County) (pending).

Sikveland v. BN, No. CDV-91-225 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Dawson County, Montana; accident in Custer County) (pending).

Smith v. BN, No. 72091 (Mont. Dist. Ct. Missoula Cnty.) (plaintiff resident of Washington; accident in Athol, Idaho) (disposed of in 1991).

Stazel v. BN, No. BDV-87-1296 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Washington; accident in Newhauser, Idaho) (disposed of in 1988).

Stebleton v. BN, No. BDV-91-910 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Valley County, Montana; accident in Minot, North Dakota) (pending).

Swanson v. BN, No. CDV-86-313 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Hill County, Montana; accident in Hill County) (disposed of in 1987).

Thompson v. BN, No. ADV-91-243 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of North Dakota; accident in Mandan, North Dakota) (pending).

Turner v. BN, No. ADV-90-457 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Meagher County, Montana; accident in Hill County) (pending).

Wickum v. BN, No. CDV-91-898 (Mont. Dist. Ct. Cascade Cnty.) (plaintiff resident of Flathead County, Montana; accident in Hill County) (pending).

Wildman v. BN, No. CV-84-195-M (Mont. Dist. Ct. Missoula Cnty.) (plaintiff resident of Custer County, Montana; accident in Yellowstone County) (disposed of in 1986).

Wright v. BN, No. 66813 (Mont. Dist. Ct. Missoula Cnty.) (plaintiff resident of Flathead County, Montana; accident in Flathead County) (disposed of in 1988).

Wyant v. BN, No. CV-88-9-BU (Mont. Dist. Ct. Silver Bow Cnty.) (plaintiff resident of Silver Bow County, Montana; accident in Bonners, Idaho) (disposed of in 1990).

APPENDIX F

FEDERAL EMPLOYEES LIABILITY ACT CASES AGAINST BURLINGTON NORTHERN RAILROAD IN MONTANA STATE COURT, 1986-1991

1. *Plaintiffs Non-Resident in Montana*

Plaintiff's Name	State of Residence	Location of Accident	Montana Cnty. Ct.
Akins	Washington	Spokane, WA	Cascade
Anderson, W.	South Dakota	Edgemont, SD	Cascade
Averill	Wyoming	Arvada, WY	Silver Bow
Belden, E.	Wyoming	Sheridan, WY	Cascade
Belden, D.	Wyoming	Bill, WY	Cascade
Bennett	Wyoming	Hines, WY	Yellowstone
Berumen, W.	Wyoming	Nacco Jct., WY	Cascade
Brown	Wyoming	Sheridan, WY	Cascade
Cardinal	Washington	Kettle Falls, WA	Cascade
Cheney	Wyoming	Parkman, WY	Park
Clemens	Wyoming	Ulm, WY	Yellowstone
Counts	Nebraska	Alliance, NE	Cascade
Deluna	Wyoming	Sully Springs, ND	Yellowstone
Dickerson	Nebraska	Bill, WY	Cascade
Dietel	Washington	Yardley, WA	Cascade
Douglas	Wyoming	Sheridan, WY	Cascade
Doyle	Wyoming	Verona, WY	Yellowstone
Edeler	Wyoming	Norland, WY	Yellowstone
Epple	Wyoming	Gillette, WY	Yellowstone
Erickson	Wyoming	Lariat, WY	Yellowstone
Ericson	Washington	Spokane, WA	Cascade
Faxon	Wyoming	Antelope, WY	Yellowstone
Harrod	Wyoming	Sheridan, WY	Yellowstone
Ford	Wyoming	Sheridan, WY	Yellowstone
Hattenburg	Washington	Odessa, WA	Cascade
Healy	South Dakota	New Castle, WY	Yellowstone
Hernandez	Wyoming	Minnesela, WY	Cascade
Hitchcock	Wyoming	Casper, WY	Yellowstone
Hoffman	North Dakota	West Fargo, ND	Cascade
Hofmeister	Wyoming	Elkhorn, WY	Yellowstone
Houser	Colorado	Broomfield, CO	Cascade
Jeanneret	Washington	Parkwater, WA	Silver Bow

Plaintiff's Name	State of Residence	Location of Accident	Montana Cnty. Ct.
Johnson, G.	South Dakota	Dawson Cty., MT	Cascade
Johnson, R.	Nebraska	Alliance, NE	Cascade
Johnson, T.	Wyoming	Sheridan, WY	Yellowstone
Jolley	Wyoming	Parkman, WY	Cascade
Keller	South Dakota	Prairie Cty., MT	Cascade
Kobielusz	Wyoming	Sheridan, WY	Cascade
Luoma	Wyoming	Lovell, WY	Yellowstone
McFall	Wyoming	Casper, WY	Yellowstone
Meeker	Wyoming	Sheridan, WY	Cascade
O'Brien	Washington	Spokane, WA	Cascade
Peccia	Wyoming	Bill, WY	Yellowstone
Rieck	Wyoming	Sage Creek, WY	Cascade
Sams	Wyoming	Gillette, WY	Yellowstone
Scott	Washington	Spokane, WA	Silver Bow
Smith	Washington	Athol, ID	Missoula
Stazel	Washington	Newhauster, ID	Cascade
Thompson	North Dakota	Mandan, ID	Cascade

2. *Plaintiffs Residents of Montana*

Plaintiff's Name	County of Residence	Location of Accident (Montana County if no state indicated)	Montana Cnty. Ct.
Ament	Missoula Cty., MT	Liberty	Silver Bow
Amsk, D.	Park Cty., MT	Yellowstone	Cascade
Amsk, M.	Dawson Cty., MT	Dawson	Cascade
Anderson, J.	Hill Cty., MT	Hill	Cascade
Bardon	Rosebud Cty., MT	Rosebud	Cascade
Bear	Glacier Cty., MT	Glacier	Cascade
Beatson	Valley Cty., MT	Roosevelt	Cascade
Belden, J.	Wyoming	Big Horn	Cascade
Berumen, S.	Yellowstone Cty., MT	Donkey Creek, WY	Yellowstone
Beto	Phillips Cty., MT	Hill	Cascade
Bilger	Blaine Cty., MT	Blaine	Cascade
Blanchette	Dawson Cty., MT	Rosebud	Cascade
Borst	Hill Cty., MT	Hill	Cascade
Bowles	Dawson Cty., MT	Custer	Cascade
Brakstad	Cascade Cty., MT	Fergus	Cascade
Brinkman	Cascade Cty., MT	Fergus	Cascade

Plaintiff's Name	County of Residence	Location of Accident (Montana County if no state indicated)	Montana Cnty. Ct.
Bronder	Blaine Cty., MT	Hill	Cascade
Carrasco	Yellowstone Cty., MT	Yellowstone	Silver Bow
Cislo	Cascade Cty., MT	Fergus	Cascade
Comer	Dawson Cty., MT	Dawson	Cascade
Corcoran	Hill Cty., MT	Roosevelt	Cascade
Cote	Flathead Cty., MT	Glacier	Cascade
Cottrell	Hill Cty., MT	Hill	Cascade
Deshner	Cascade Cty., MT	Hill	Cascade
Easley	Gallatin Cty., MT	Powell	Gallatin
Engleman	Hill Cty., MT	Phillips, Flathead & Glacier	Cascade
English	Hill Cty., MT	Hill	Cascade
Frank	Lewis and Clark Cty., MT	Lewis and Clark	Cascade
Fuller	Flathead Cty., MT	Flathead	Cascade
Gallery	Flathead Cty., MT	Flathead	Cascade
Gendrow	Flathead Cty., MT	Flathead	Cascade
Gilliland	Flathead Cty., MT	Flathead	Cascade
Graham	Missoula Cty., MT	Flathead	Cascade
Gummer	Hill Cty., MT	Hill	Cascade
Hammer	Yellowstone Cty., MT	Sweet Grass	Cascade
Harms, T.G.	Park Cty., MT	Gallatin	Cascade
Haug	Park Cty., MT	Park	Cascade
Hayes	Park Cty., MT	Warren, WY	Cascade
Henderson	Hill Cty., MT	Hill	Cascade
Hertsgaard, J.	Hill Cty., MT	Hill	Cascade
Hertsgaard, J.	Hill Cty., MT	Hill	Cascade
Hobby	Valley Cty., MT	Valley	Cascade
Horton	Carbon Cty., MT	Parkman, WY	Yellowstone
Ivers	Flathead Cty., MT	Flathead	Cascade
Jennings	Hill Cty., MT	Hill	Cascade
Jurenic	Silver Bow Cty., MT	Sweet Grass	Cascade
Kalanick	Hill Cty., MT	Hill	Cascade
Kincaid	Cascade Cty., MT	Toole	Cascade
Knutson	Hill Cty., MT	Flathead	Cascade
Lambert	Valley Cty., MT	Valley	Cascade

Plaintiff's Name	County of Residence	Location of Accident (Montana County if no state indicated)	Montana Cnty. Ct.
LaSalle, J.	Chouteau Cty., MT	Hill	Cascade
LaSalle, J.	Chouteau Cty., MT	Hill	Cascade
Lay	Lewis and Clark Cty., MT	Lewis and Clark	Cascade
Lemire	Hill Cty., MT	Lewis and Clark	Cascade
Liese	Hill Cty., MT	Hill	Cascade
Lodinoff	Flathead Cty., MT	Flathead	Cascade
Marmon	Valley Cty., MT	Roosevelt	Cascade
McClintock	Missoula Cty., MT	Flathead	Missoula
Miller	Hill Cty., MT	Hill	Cascade
Misevic	Missoula Cty., MT	Lewis and Clark	Silver Bow
Mitchell	Yellowstone Cty., MT	Yellowstone	Cascade
Mogen	Rosebud Cty., MT	Rosebud	Cascade
Mueller	Yellowstone Cty., MT	Yellowstone	Park
Nelson, E.	Gallatin Cty., MT	Stillwater	Park
Nelson, J.	Mineral Cty., MT	Flathead	Cascade
Oblizalo	Yellowstone Cty., MT	Park	Cascade
Olsen	Cascade Cty., MT	Missoula	Cascade
Olson	Park Cty., MT	Park	Deer Lodge
Olson	Cascade Cty., MT	Flathead	Cascade
Omvig	Valley Cty., MT	Valley	Cascade
Paul	Flathead Cty., MT	Flathead	Silver Bow
Pennecard	Flathead Cty., MT	Flathead	Cascade
Pepos	Cascade Cty., MT	Powell	Cascade
Phillips	Park Cty., MT	Park	Cascade
Plouffe	Blaine Cty., MT	Hill	Cascade
Reister	Lewis and Clark Cty., MT	Broadwater	Yellowstone
Rice	Missoula Cty., MT	Yellowstone	Missoula
Richard	Hill Cty., MT	Hill	Cascade
Robbins	Flathead Cty., MT	Flathead	Missoula
Roseburg	Glacier Cty., MT	Glacier	Cascade
Sadowsky	Dawson Cty., MT	Dawson	Cascade
Scott	Cascade Cty., MT	Toole	Cascade
Seibel	Lewis and Clark Cty., MT	Lewis and Clark	Cascade

Plaintiff's Name	County of Residence	Location of Accident (Montana County if no state indicated)	Montana Cnty. Ct.
Sikveland	Dawson Cty., MT	Custer	Cascade
Stebleton	Valley Cty., MT	Minot, ND	Cascade
Swanson	Hill Cty., MT	Hill	Cascade
Turner	Meagher Cty., MT	Hill	Cascade
Wickum	Flathead Cty., MT	Hill	Cascade
Wildman	Custer Cty., MT	Yellowstone	Missoula
Wright	Flathead Cty., MT	Flathead	Missoula
Wyant	Silver Bow Cty., MT	Bonners, ID	Silver Bow

Supreme Court, U.S.
FILED
DEC 12 1991
OFFICE OF THE CLERK

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Petitioner,
v.
WILLIAM D. FORD,
Respondent,

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.
THOMAS L. JOHNSON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

---

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QUESTION PRESENTED

The question presented by this case is not as broad as suggested by petitioner. Petitioner alleges an equal protection violation between resident and non-resident corporations. However, the more accurate question is whether the pertinent venue statute violates the Equal Protection Clause as applied to an FELA case filed in Montana state court.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, William D. Ford and Thomas L. Johnson ("injured railroaders" or "respondents" herein), respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision and order of the Supreme Court of the State of Montana entered in the above cases on August 12, 1991.

RESPONDENTS' STATEMENT OF THE CASE

The true scope of this case is best understood by examining what the issue actually is—and what it is not.

This *is* a case involving a foreign corporation, a non-resident plaintiff, and a statute which on its face treats a foreign corporation differently for venue purposes than it would otherwise he treated if it were a domestic corporation.

However, this is *not* a case involving a venue question in a garden-variety transitory action.

This case is *solely* a venue question in an FELA case.

Additionally, seemingly well-intended and soporific arguments aside, this case represents nothing more than a new tack being tested by BN in its tireless efforts to chip away at the liberal rights expressly granted injured railroaders by the United States Congress. Over the past thirty years, BN has made no less than six (6) unsuccessful attempts in the Montana Supreme Court to deprive injured railroaders of their liberal rights of forum selection through the attempted use of the doctrine of *forum non conveniens*. Having been defeated on all previous occasions, BN is now attempting an "end run" by attacking the Montana venue statutes on constitutional grounds.

A. The Montana Venue System

It is questionable whether or not MCA § 25-2-118 could pass constitutional muster for the manner in which it distinguishes between residents and non-residents in an ordinary transitory action. However, this is neither the time nor the place to make such a determination. Since this is an FELA case, the only question appropriate for consideration is whether the Montana venue system is constitutional as it applies to this FELA case.

B. The Proceedings Below

The recitation contained in the petition outlining the proceedings below is fairly accurate, with two notable exceptions.

First, the underlying actions *were* brought in a "selected" Montana state court. Petitioner obviously is attempting to attach a negative connotation to the fact that the court was "selected." Nevertheless, whether petitioner likes it or not, the FELA has long afforded injured railroaders, and other workers falling under the coverage of the Act, the ability to "select" the forum in which their action is to be heard.

Second, petitioner's interpretation of the Montana Supreme Court's ruling in this case is, at best, highly skewed—at worst, erroneous. Particularly, and perhaps most importantly, petitioner claims that the Montana Supreme Court "specifically declined to address the equal protection issue raised by BN—whether the Montana venue statute has 'a rational basis for treating out-of-state corporations differently from domestic corporations . . .'" As explained below, this statement is patently false.

REASONS WHY THE PETITION SHOULD BE DENIED

Pursuant to Rule 10, a petition for writ of certiorari will be granted *only* when there are *special and important* reasons therefor. BN bases their petition on a lack of agreement between state supreme courts as to whether discrimination in state court venue against out-of-state corporations violates the Equal Protection Clause. However, the real issue in this case is whether the Montana venue statutes pass constitutional muster as they apply to non-resident defendants *in FELA actions*. With regard to this issue, no conflict exists between any of the state supreme courts or the United States Courts of Appeals. Accordingly, no special or important reasons exist to grant BN's petition for a writ of certiorari.

I. BN HAS MISCONSTRUED THE REASONING BEHIND THE MONTANA SUPREME COURT'S DECISION IN THIS CASE

The full text of the Montana Supreme Court's decision in this case is set out in Appendix A in BN's petition (BN App. 1a to 15a). Nowhere in such decision does it state, or much less imply, that the Montana venue statute is beyond the reach of the Equal Protection Clause. However, the Montana Supreme Court found the liberal forum policies underlying the FELA to constitute a rational basis for the disparate treatment of BN in this case under Montana's venue laws. *See* BN App. 9a-11a.

The Montana Supreme Court's decision was based on the following:

> 1. *Cincinnati St. Ry. v. Snell*, 103 U.S. 30, 24 S.Ct. 319, 48 L.Ed. 604 (1904), holds that the Fourteenth Amendment safeguards only fundamental rights and does not guarantee the right to have disputes determined in one forum, as opposed to another;
>
> 2. *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 47 S.Ct. 678 (1927), is not controlling for several reasons:
>
> > a. *Saunders* is distinguishable on its facts since in that case, the defendant did no business in the county where venue was established. In this case, BN admittedly does business in Yellowstone County.
> >
> > b. In *Saunders*, plaintiff's action was brought pursuant to the common law of the State of Arkansas. In this case, the injured railroaders' claims are based upon federal statutory law which was designed to provide injured railroad workers with as many options as possible when choosing venue.
> >
> > c. *Saunders* did not preclude disparate treatment under a state's venue laws where a rational

basis could be shown for such treatment such as the national policy underlying the FELA which allows railroad workers greater flexibility when choosing a forum than other litigants.

d. Subsequent decisions by the U.S. Supreme Court raise a question whether *Saunders* continues to be good law. (The Montana Supreme Court discussed the perceived effect of *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 51 S.Ct. 228, 75 L.Ed. 482 (1931), and *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 96 S.Ct. 1800, 48 L.Ed.2d 263 (1976), and also noted that the challenged statute in this case is nondiscriminatory in its operation.)

Although the Montana Supreme Court based its decision on "all of the above reasons," its decision was *particularly based* on the "strong national policy favoring a plaintiff's selection of forum in actions brought under the Federal Employers Liability Act." BN App. at 15a. Specifically, the Montana Supreme Court stated:

> Without addressing the greater issue of whether there is a rational basis for treating all out-of-state corporations differently from all domestic corporations, it does appear that there is a *commonly accepted historic justification* for allowing railroad workers greater flexibility when choosing a forum than other litigants. * * * (BN App. at 9a, emphasis added.)

Also:

> It is clear then that *national policy*, dating back to 1910, which was intended to address the dangerous working conditions of railroad workers and to facilitate recovery for families of injured workers, favors a policy of allowing railroad workers to sue their employer at any location where the employer does business. *That national policy presents a justification for disparate treatment in this case*, which was not present in the *Saunders* case. (BN App. at 11a, emphasis added.)

The statements in BN's petition to the effect that the Montana Supreme Court specifically declined to address the equal protection issue are patently false. The decision is eminently clear that the national policy underlying the FELA provides a rational justification for disparate treatment of the foreign corporation in this case.

II. BN'S "FORUM-SHOPPING" ARGUMENTS HAVE NO APPLICATION TO THIS CASE

Presumably as a carry-over from its attempts to utilize the doctrine of *forum non conveniens* in Montana state court FELA cases, BN's brief is peppered with buzzwords and phrases such as: "virulent," "abusive," and "extreme" forum-shopping; "arbitrary" and "unwarranted" localism; "torrent" of FELA claims; and "gross discrimination" and "prejudice" experienced by BN.

By repeated use of such words and phrases, BN attempts to obscure the incontrovertible fact that forum-shopping is *expressly sanctioned* under the FELA.

Additionally, petitioner purports to demonstrate the emergence of "some significant trends" regarding state court FELA filings through certain "statistics." (BN App. 27a-44a) However, BN's "statistics" are not only irrelevant, but also misleading.

Montana is an extremely large and sparsely-populated state. The two largest cities in Montana are Billings and Great Falls. As reflected by BN's "statistics," the great majority of the FELA cases against BN in Montana state courts have been filed in Yellowstone and Cascade Counties, the counties in which Billings and Great Falls are located. Notwithstanding the fact that the bulk of Montana's lawyers are located in these two counties, equally prevalent is the concentration of medical facilities.

In the instant case, the injured railroaders are both residents of Sheridan, Wyoming, and were injured in or around BN facilities in that city. Sheridan is approxi-

mately 100 miles southeast of Billings, Montana. The Billings medical community provides health care services over a four-state area through its sixteen clinics, over 200 physicians, and two modern hospitals. Following their injuries, both injured railroaders were treated (and continue to be treated) by Billings physicians.

From the standpoint of personal injury litigation, facilitating the attendance of diagnostic, treating and consulting physicians, not only for consulting and discovery purposes, but also for purposes of testimony at trial, is of paramount importance. As a result, it is obviously preferable for the litigation to take place in a locale where the attendance of physicians, therapists, counselors, etc., can be facilitated.

There are two principal east-west railroad routes traversing the State of Montana, the "north route" and the "south route." The "north route" hugs the Canadian border in the northern part of the state, running through the City of Havre, the present base of BN's operations in Montana. From the standpoint of medical care, facilities in Great Falls (Cascade County) and Kalispell (Flathead County) provide advanced medical care for the "north route." For the "south route" (as well as various trackage located in the northern part of Wyoming) the Billings (Yellowstone County) medical community provides advanced medical care. Viewed within this framework, the "statistics" as to FELA state court filings obviously reflect practical considerations as opposed to "virulent forum-shopping." It is an unfounded leap of abstraction for BN to suggest that the Yellowstone and Cascade County courts and their juries have become "powerful magnets" for FELA claims. First, there is no evidence that Yellowstone and Cascade County juries render "enhanced verdicts" against FELA defendants. Second, and perhaps more importantly, *very few* FELA

cases filed in Montana state courts every reach a jury—all but a scintilla are settled prior to trial.[1]

In conclusion, BN's suggestion that "litigants are skillfully exploiting the discriminatory provisions of the Montana venue statute" is utterly belied by the common sense practicalities associated with conducting personal injury litigation in a sparsely-populated state where advanced medical facilities are highly concentrated.

Last, BN alleges that the great majority of FELA cases against BN in Montana state courts present "no connection whatever" to the county of venue. First, this statement is erroneous from the standpoint that an obvious and legitimate connection exists vis-a-vis the location of medical and rehabilitation personnel. Second, BN's statement is irrelevant from the standpoint that the FELA expressly sanctions the broad availability of forums for an injured railroader. In this regard, the legislative history of the FELA is illustrative:

In reporting the FELA bill out of committee, Senator Borah stated his objection to the pre-FELA law as follows:

> Plaintiff may sometimes be compelled to go a great distance in order to have his cause of action against the defendant by reason of the fact that now the action must be brought in the district in which the defendant is an inhabitant . . .
>
> . . . If this bill should be passed the law will be remedied in that respect, enabling the plaintiff to bring his action where the cause of action arose or where the defendant may be doing business. The bill enables the plaintiff to find the corporation at any point or place where it is actually carrying on business and there lodge his action, if he chooses to do so. 45 Cong.Rec. 4034-4035 (1910).

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[1] Conspicuously absent in BN's "statistics" is any data to reflect the ratio between cases settled versus tried before a jury.

In 1947, a bill known as the "Jennings Bill" was proposed which would have repealed most of Section 6 and limited the forum choices of injured railroad workers to the district where the cause of action arose or where the plaintiff resided. H.R. 1639, 80th Cont., 1st Sess. (1947). However, the bill did not pass. Accordingly, the strength of the policy behind Section 6 can further be gleaned from Congress's refusal to pass the Jennings Bill.

Under the FELA, Congress has given the injured worker broad discretion in his choice of forum in which to have his claim tried. It cannot be seriously disputed that the forum provisions of the FELA resulted from a recognition of the enormous disparity between the respective positions of the injured railroaders and powerful interstate railroads. Additionally, the liberal venue provisions were obviously designed to enable an injured railroader to have his case heard in a more "neutral" setting where most of the jury panel was not likely to be railroad employees or relatives or dependents of railroad employees. By seeking to require injured railroaders to file suit in Hill County, BN is attempting to do exactly what the FELA was designed to avoid, i.e., forcing the injured railroader to file suit in a "railroad town."

III. THE MONTANA SUPREME COURT'S HOLDING IN THIS CASE IS LIMITED TO FELA ACTIONS IN STATE COURT

Assuming, arguendo, that MCA § 25-2-118 has the effect of unfairly discriminating against foreign corporations in non-FELA cases, the policy favoring the injured railroader's choice of forum under the FELA, and the "open court policy" of the State of Montana, mandate that the injured railroaders' choice of forum should be left undisturbed in the present case.

As indicated above, under the FELA, Congress has expressly given the injured railroader broad discretion in his choice of forum in which to have his claim tried.

It is beyond dispute that with the enactment of the FELA, Congress consciously decided to give an injured railroader *greater* rights in terms of venue selection than other injured parties. As a result, corporations that are subject to the FELA are treated different from corporations that are not subject to the FELA. By definition, railroad employers were therefore denied equal protection under the law. However, in enacting the FELA as an attempt to remedy the historical practices of the nation's railroads in refusing to compensate injured workmen, a rational basis exists to justify the different treatment given interstate railroads. It is similarly obvious that Congress was intimately aware of the disparity between large interstate railroad companies and injured railroaders. As a result, Congress chose to shift the burden of the loss from "those least able to bear it" and place it on those who can "measurably control their losses."

Notwithstanding the clear legislative and judicial mandates that the FELA be given a liberal construction in favor of injured railroad employees, BN has continually attempted to curtail the injured railroader's rights under the FELA. This case represents another example of BN's long string of attempts to chip away at the foundation of the liberal pro-worker policies of the FELA. Although the FELA continues to be a bitter pill for the railroads to swallow, why it is that they refuse to take their medicine and learn to live with it? Since otherwise identical procedural and substantive law would apply to this case whether it was tried in Yellowstone County or Hill County, one is forced to a conclusion that the BN is engaging in obstructionist tactics intending to deter and frustrate present and future plaintiffs. However, these are the types of tactics that promoted Congress to enact the FELA in the first place.

It is respectfully submitted that in deference to the congressional and judicial mandates of the FELA, the Montana Supreme Court properly construed the Montana venue statutes. Such a construction was consistent with

the liberal policies underlying the FELA, which undeniably were intended to provide an advantage to the injured railroaders when forced to do battle against railroad "Goliaths."

A liberal construction of the venue statutes in favor of injured railroad employees also comports with Montana's "open court policy." Article II, section 16 of the Montana State Constitution provides that "courts of justice shall be open to every person, and speedy remedy afforded for every injured person, property or character."

Statutes can also be saved from constitutional infirmity by showing that *in actual practice* discriminatory results do not occur. In *theory*, MCA § 25-2-118 appears to sanction venue in a county far removed from where BN conducts business. However, *in practice*, BN is not sued in a county where they cannot "be found" doing business. Accordingly, any discriminatory effect is nothing more than theoretical and insufficient to invalidate the statute.

Last, BN is without standing to challenge the constitutionality of the venue statutes in non-FELA situations. The inquiry in this case must be limited to whether the venue statutes are appropriate in an FELA action.

Pursuant to the foregoing argument and authority, it is the injured railroaders' position that the Montana Supreme Court's decision was correct and well supported.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONER

In its petition, Burlington Northern Railroad ("BN") showed that a perceived inconsistency in this Court's decisions has led the court below and many other state courts to uphold venue provisions that expressly discriminate against non-resident defendants.[1] Because resident corporations are not subject to these provisions, state legislatures feel free to create venue rules that authorize rampant forum shopping against non-resident interstate businesses. Such forum shopping contributes to the explosion in the frequency and cost of personal injury liti-

---

[1] The decision below, App. 1a, has recently been reported. 819 P.2d 169 (Mont. 1991).

gation around the country, as demonstrated by petitioner's extensive Montana experience.

The Opposition does not dispel the confusion, diminish the problem, or contest the basic constitutional issue. Rather, the response highlights the reasons why review by this Court is necessary. Respondents never attempt to harmonize this Court's decisions, suggesting instead that this Court's central decision on the issue has been overruled *sub silentio*. *See* Opp. at 5-6.[2] Nor do respondents deny that there is a "lack of agreement between state supreme courts as to whether discrimination in state court venue against out-of-state corporations violates the Equal Protection Clause." Opp. at 3. Respondents do not even attempt to defend the constitutionality of the statute at issue here:

> It is questionable whether or not MCA § 25-2-118 could pass constitutional muster for the manner in which it distinguishes between residents and nonresidents in an ordinary transitory action.

Opp. at 2.

Yet, despite all of these concessions, respondents praise the Montana statute—precisely because it permits unfettered forum shopping. The egregious nature of the constitutional violation here, which petitioner has admittedly been unable to remedy within the state court system and which has broad implications for a host of other state courts, demands intervention by this Court.

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1. Respondents characterize this petition for certiorari as a continuation of BN's "tireless efforts," including six Montana Supreme Court cases, "to deprive injured

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[2] Respondents argue that *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927), has been overruled implicitly by later decisions of this Court, including *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976). *See* Opp. at 5. This argument is simply incorrect: *Saunders* was not overruled by *Starnes*, and has since been cited by this Court as good law. *See* Pet. at 9-11. Nor is *Saunders* distinguishable from this case. *See id.* at 10 n.13.

railroaders of their liberal rights of forum selection . . . ." Opp. at 2. In fact, *BN has repeatedly and unsuccessfully sought relief within the Montana court system* from the effects of the venue discrimination to which it has been subjected for decades.[3] Even in this case, BN invited the Montana Supreme Court to construe the state venue law in a manner that would have accorded equal treatment to out-of-state corporations, but that effort was rebuffed.[4] If anything, the long history of litigation over this issue shows that the present constitutional challenge is one of last resort. A refusal to review this case would signal to both the Montana courts and the courts of other states that out-of-state corporations may be subjected to forum shopping with impunity.

2. Under the applicable Montana venue statute, Mont. Code Ann. § 25-2-118 (1989), App. 26a, a domestic corporation may only be sued in its county of residence, whereas an out-of-state corporation may be sued anywhere in the state. Thus, non-resident corporations are expressly denied equal protection from statewide forum shopping by plaintiffs. The disparity in treatment exists regardless of the type of business in which the non-resident corporation engages, or the type of legal action involved.

Nevertheless, respondents argue that the discrimination here is permissible because the underlying cases happen to have been brought under the Federal Employers' Lia-

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[3] *See State ex rel. Burlington Northern R.R. v. District Court of the Eighth Judicial Dist.*, No. 90-233 (Mont. June 28, 1990); *Haug v. Burlington Northern R.R.*, 236 Mont. 368, 770 P.2d 517 (1989); *State ex rel. Burlington Northern R.R. v. District Court of the Eighth Judicial Dist.*, 229 Mont. 325, 746 P.2d 1077 (1987); *Bevacqua v. Burlington Northern, Inc.*, 183 Mont. 237, 598 P.2d 1124 (1979); *Labella v. Burlington Northern R.R.*, 182 Mont. 202, 595 P.2d 1184 (1979); *State ex rel. Great Northern Ry. v. District Court of the Second Judicial Dist.*, 139 Mont. 453, 365 P.2d 512 (1961); *Bracy v. Great Northern Ry.*, 136 Mont. 65, 343 P.2d 848 (1959), *cert. denied*, 361 U.S. 949 (1960).

[4] *See* App. 5a-6a.

bility Act, 45 U.S.C. §§ 1-60 (1981) ("FELA").[5] In its rawest form, the argument seems to be that the "liberal pro-worker policies of the FELA" justify the unequal treatment of out-of-state railroad defendants in state court. *See* Opp. at 10. This is an enormous *non sequitur*, without support either in constitutional principle or the FELA. Respondents fail to explain how a state law may find its own "rational basis" in a federal statute enacted nearly a half century later.[6] The Montana venue distinction is not limited to FELA cases, and applies in many other contexts. *See* Pet. at 12 & n.15. In any event, the FELA provides absolutely no support for discrimination in state court venue between in-state and out-of-state railroads. *See* Pet. at 12 & n.16.[7] Federal law supplies no reason why BN should be subjected to wide-open forum shopping within the state's court system, while venue in FELA and other suits against Montana-based railroads is far more restricted.

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[5] The pertinent portion of the decision below is found at App. 9a-11a. Contrary to respondents' assertion, Opp. at 3, the Montana Supreme Court never ventured a rational basis for the disparate treatment worked by the Montana statute at issue. The pertinent portion of the decision below began with the preface, "[*w*]*ithout addressing the greater issue of whether there is a rational basis for treating all out-of-state corporations differently from all domestic corporations . . .*," and then went on to discuss reasons for giving FELA plaintiffs relatively broad venue rights, but never addressed the reasons why venue should be broader against out-of-state defendants than in-state defendants. App. 9a (emphasis added).

[6] The Montana venue statute has remained substantially the same since enacted in 1864, long before the enactment of the FELA in 1908. FELA, 35 Stat. 65 (1908).

[7] The FELA does not discriminate in venue for actions brought in federal court. 45 U.S.C. § 45 (1981). And for FELA actions in state court, this Court has expressly required nondiscrimination in venue rules as between FELA actions and actions under state law. *See Miles v. Illinois Cent. R.R.*, 315 U.S. 698, 703 (1942) ("By virtue of the Constitution, the courts of the several states must remain open to [FELA] litigants on the same basis that they

That the underlying cases here arise under the FELA does not diminish the constitutional dimensions of the question presented. *The statute's discrimination is not between plaintiffs and defendants, or between railroads and other businesses; it is between domestic and non-resident corporations.* Every case will have its own factual specifics, and the fact that these cases arise under a particular federal statute, with its own substantive objectives, does not obscure the fundamental issue. As set out in the petition, constitutional law has a vital role to play in restraining state legislation which targets non-residents for disadvantageous treatment. *See* Pet. at 18-19 & nn.24-26. The constitutional question presented in this case—equal protection in state court venue—has arisen in a number of other state supreme courts, in many different types of cases, with widely divergent results. *See* Pet at 20-24 & nn.27-36. The issue is worthy of review by this Court, and is crisply presented by this case.

3. The Opposition concedes, sometimes almost exalts, the forum shopping against BN in Montana state court.[8]

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are open to litigants with causes of action springing from a different source.").

The legislative history of the FELA does not support respondents' contentions. Opp. at 8-9. The quotation of Senator Borah refers to the *federal* court venue provisions of the statute. In addition, respondents' invocation of the "Jennings Bill" is pointless. The Jennings bill was not rejected by either house of Congress: the House approved the bill, 93 Cong. Rec. 9193-9194 (July 17, 1947), but the Senate never debated or voted on it. In these circumstances, no inference about "legislative intent" can be drawn.

[8] *See, e.g.*, Opp. at 3 ("the underlying actions *were* brought in a 'selected' Montana state court" (emphasis in the original)); *id.* at 6 ("incontrovertible fact that forum-shopping is *expressly sanctioned* under the FELA" (emphasis in the original)). Contrary to the Opposition, reversal of the decision below would not "forc[e]" FELA plaintiffs to sue "in a 'railroad town.'" Opp. at 9. A FELA action could still be brought in any federal district court where the railroad does business, or in any state court specified by state venue laws of general applicability (for example, where the accident occurred).

Yet respondents also hedge their bets, attempting to rationalize why they and so many other plaintiffs have gone out of their way to bring suit in two selected Montana state courts. For the first time, they claim that the heavy concentration of cases brought in Yellowstone County (Billings) and Cascade County (Great Falls) is due to the location of doctors and medical facilities in those two places. Opp. at 6-7.

On its face, this assertion is simply not credible.[9] Railroad workers from locations as distant as Nebraska and Colorado would not have ignored the medical facilities available in their own and intermediate states in order to obtain medical treatment in a county in a distant part of Montana. Nor is it plausible that many Montana residents with homes closer to Billings would bypass medical facilities available there in order to be treated in Cascade County.[10]

In fact, petitioner has analyzed the last twenty FELA accident cases filed against it in state court in Montana and found no substance in respondents' assertion.[11] Six-

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[9] Under this theory, personal injury plaintiffs make their choice of forum not in order to achieve their maximum tactical advantage, or for the greatest geographical convenience of themselves and their lawyers—but for the convenience of the doctors who serve as attending physicians and expert witnesses.

[10] *See generally* App. 27a-44a (six-year docket summary). Sixteen out-of-state plaintiffs must have traveled *past* Billings to bring suit in Cascade County: Anderson (resident of South Dakota); Belden, E. (Wyoming); Belden, D. (Wyoming); Berumen, W. (Wyoming); Brown (Wyoming); Dickerson (Nebraska); Douglas (Wyoming); Hernandez (Wyoming); Houser (Colorado); Johnson, G. (South Dakota); Johnson, R. (Nebraska); Jolly (Wyoming); Keller (South Dakota); Kobielusz (Wyoming); Meeker (Wyoming); Rieck (Wyoming).

In addition, at least sixteen plaintiffs who reside near or east of Billings passed up Billings to bring suit approximately 100 miles to the west in Cascade County: Amsk, D.; Amsk, M.; Bardon; Blanchette; Bowles; Comer; Hammer; Harms, T.G.; Haug; Hayes; Mitchell; Mogen; Oblizalo; Phillips; Sadowsky; Sikveland.

[11] The most recent twenty cases were used because their medical files were readily available for review.

teen of the twenty cases were filed in Cascade County; in thirteen of these, *not a single doctor* was located in Cascade County.[12] Thus, the role of Cascade County, Montana, in attracting cases from all over a multi-state region, cannot be explained by its asserted medical pre-eminence.

4. Respondents deny the most obvious motive for the prevalence of forum shopping in Montana, stating that "there is no evidence that Yellowstone and Cascade County juries render 'enhanced verdicts' against FELA defendants." Opp. at 7. This assertion runs directly contrary to ordinary expectations and understandings about how personal injury litigation is conducted, and therefore demands a reply. Over the past six years, BN's own experience has been that the average dollar result in a FELA action in Cascade County court—where the majority of such state court cases are filed—is approximately twice that in other Montana state courts.[13] Furthermore, the average dollar result in Cascade County cases is well over twice the corresponding amount for all FELA cases brought against BN.[14]

In the give and take of personal injury litigation, forum shopping at the beginning of a case only opens the door for other forms of bias against an out-of-state corporate defendant. As one state supreme court observed earlier this year, "[i]n any adversarial system where residents are pitted against non-residents, there will inevitably be a temptation to redistribute wealth in the

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[12] In two of the remaining three cases in Cascade County, the plaintiffs and some of their doctors were from Hill County, the county of BN's principal place of business in Montana.

[13] The comparison is based on FELA cases against BN in Montana state court, which were disposed of by verdict or settlement in the years 1986 through 1991. Settlements, of course, are based on the parties' expectations of the likely size of award for a particular jury or jury venire.

[14] This comparison is based on nearly three thousand FELA cases against BN nationwide (in federal and state courts in twenty-four states), which were disposed of by verdict or settlement in the years 1986 through 1991.

direction of residents . . . ." *Blankenship v. General Motors Corp.*, No. 19949, slip op. at 12 n.11 (W. Va. June 27, 1991). The author of that opinion made the point even more directly in his book:

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.[15]

Judges in Montana, as in West Virginia and almost half of all of the states, are elected. When statewide forum shopping is allowed, plaintiffs are free to select those judges and juries who are by reputation most inclined to grant high monetary awards against out-of-state corporate defendants.[16]

Thus, permitting the plaintiff to have his or her choice of the *most favorable forum in the state* shifts the litigation balance dramatically in the plaintiff's favor. For this reason, the Montana venue statute is profoundly discriminatory, in authorizing wide-open forum shopping against out-of-state corporations while no such latitude is permitted plaintiffs who sue Montana-based corporations.

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[15] Richard Neely, *The Product Liability Mess: How Business Can Be Rescued From State Court Politics* 4 (1988); *see also id.* at 24-25 (incentives facing elected judges); 70-71 (preferences of state courts and juries for in-state versus out-of-state interests). Justice Neely has served on the highest court of West Virginia since 1973, three times as Chief Justice.

[16] As one scholar has observed:

> [A]ny lawyer [knows] that the intangibles of personnel and procedure [can] tip the balance in many a case. . . . American lawyers have long known how to take a defendant with statewide operations to the right county and city; thus do rural complaints against Illinois railroads get filed in Chicago to avoid the stingy juries often found downstate.

Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* 82-83 (1991).

For whatever reason, the Montana legislature has chosen to shield domestic corporations from statewide forum shopping. Therefore, it is unconstitutional for Montana to deny that same protection of laws to out-of-state corporations.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision and order of the Supreme Court of the State of Montana. In the alternative, the writ should issue and the decision and order below should be summarily reversed on the basis of *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927).

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 10 1992
OFFICE OF THE CLERK

No. 91-779

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.
WILLIAM D. FORD,
Respondent.

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.
THOMAS L. JOHNSON,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Montana

---

JOINT APPENDIX

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Mont. Code Ann § 25-2-118 (1989)	Pet. App. at 26a

MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT, YELLOWSTONE COUNTY

DV 89 974

WILLIAM D. FORD,
Plaintiff,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation,
Defendant.

RELEVANT DOCKET ENTRIES

Date	No.	Entries
8/11/89	1	Complaint Filed
8/11/89	2	Summons Issued ref 8-28-89
9/6/89	3	Motion for Change of Place of Trial filed
10/06/89	6	Memorandum in support of motion for change of place of trial filed
10/06/89	7	Affidavit filed
11/08/89	11	NOTICE OF TAKING DEPOSITION FLD (Defendant)
11/09/89	12	Amended NOTICE OF TAKING DEPOSITION FLD (Defendant)
03/07/90	22	BRIEF IN OPPOSITION FILED (to Mo/ change of Venue)
03/08/90	23	MOTION FILED (for Notification)
03/08/90	24	BRIEF IN SUPPORT FILED (of motion for Notification)
3/23/90	27	Brief in response to motion for notification filed

Date	No.	Entries
4/4/90	28	Pltfs REPLY BRIEF FILED (re: Mo/notification)
4/20/90	29	Reply memo in supp. of Mo/change of place of trial filed
5/1/90	30	CERTIFICATE OF SERVICE FILED (Discovery)
5/8/90	31	Notice of right of intervention filed
6/19/90	32	MOTION FILED (to Lodge discovery)
6/20/90	33	ORDER GRANTING (Mo to file discovery) (1-item only)
6/20/90	34	DISCOVERY FILED (Response to Interrogatories)
6/26/90	35	Notice of filing RESPONSE FILED
8/1/90	36	Motion filed (to withdraw plaintiffs Request)
8/7/90	37	Order filed (admitting motion on briefs)
9/7/90	38	Order & Memorandum (denying motion) filed
10/5/90	39	Notice of Appeal fld
10/5/90	40	PROOF OF MAILING FILED
9/3/91	41	Remittitur Affirming filed
9/3/91	42	Supreme Court Opinion filed
11/20/91	43	Notice of filing

MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT, YELLOWSTONE COUNTY

DV 89 975

THOMAS L. JOHNSON,
Plaintiff,

VS.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware Corporation,
Defendant.

RELEVANT DOCKET ENTRIES

Date	No.	Entries
8/11/89	1	Complaint Filed
8/11/89	2	Summons Issued ref 8-28-89
9/6/89	3	Motion for Change of Place of trial filed
10/06/89	6	Memorandum in support of motion for change of place of trial filed
10/06/89	7	Affidavit filed (Mark C. Bruce)
11/08/89	11	NOTICE OF TAKING DEPOSITION FLD (Defendant)
11/08/89	12	NOTICE OF TAKING DEPOSITION FLD (Defendant)
3/7/90	20½	Pltfs brief in opposition to change of venue
3/8/90	21	MOTION FILED for notification
3/8/90	22	BRIEF IN SUPPORT FILED
3/23/90	25	Brief in Response to Mo. for Notification filed
4/4/90	26	Plaintiff's REPLY BRIEF FILED

Date	No.	Entries
4/20/90	27	Reply Memorandum fld. (Defendant change of place of trial)
05/01/90	28	CERTIFICATE OF SERVICE FILED (Discovery)
06/19/90	29	MOTION FILED (to Lodge fruits of discovery)
6/28/90	30	ORDER GRANTING Motion #29
7/2/90	31	Notice of filing Discovery filed
8/1/90	32	MOTION FILED (to withdraw plaintiff's Request)
8/2/90	33	ORDER FILED (re: right to appear)
8/14/90	34	ORDER FILED (Change Place of trial)
9/21/90	35	ORDER DENYING FILED (Change of Venue)
10/5/90	36	Notice of Appeal fld
10/5/90	37	PROOF OF MAILING FILED
9/3/91	38	Remittitur Affirming filed (Copy)
9/3/91	39	Copy of Supreme Court Opinion filed
11/20/91	40	Notice of filing filed

MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT, YELLOWSTONE COUNTY

Cause No. DV 89-974

Judge: RUSSELL K. FILLNER

WILLIAM D. FORD,
Plaintiff,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation,
Defendant.

COMPLAINT AND REQUEST FOR JURY TRIAL

COMES NOW the Plaintiff, William D. Ford, by his attorneys, Gary K. Wood and Robert S. Fain, Jr., and for his complaint against Defendant, Burlington Northern Railroad Company, a corporation, states:

1. Plaintiff brings this action under the provisions of Title 45, Sections 1-60 of the United States Code, regulations promulgated under the authority of those sections, and other Federal Safety laws which have been incorporated herein by decision; of which Sections 51-60 commonly known and referred to as the Federal Employers' Liability Act and under the terms of that Act this Court has jurisdiction.

2. At all times herein mentioned Defendant was a corporation engaged in the business of owning, maintaining and operating a line and system of railroad which extended in part through Billings, Montana.

3. At all times herein mentioned Defendant was an interstate carrier by rail and was engaged in interstate transportation and commerce.

4. At the time of the occurrence for which this action is brought Plaintiff was employed by Defendant as its servant and employee and part or all of Plaintiff's duties were in the furtherance of interstate commerce or directly, closely and substantially affected interstate commerce.

5. Both Plaintiff and his employer, the Defendant herein, were engaged in interstate commerce within the meaning of the Federal Employers' Liability Act and their mutual rights and liabilities were governed and controlled by that Act at the time of the occurence for which this action is commenced.

6. On or about February 7, 1989, at approximately 11:20 a.m., Plaintiff was engaged in performing the duties of his employment, namely that of a brakeman, in or about the Defendant's roundhouse in Sheridan, Wyoming.

7. At the time and place aforesaid, while in the process of walking down the sidewalk to enter the roundhouse, Plaintiff slipped and fell on the snow covered ice which had been allowed to accumulate in the area and as a result of which, Plaintiff was caused to suffer injuries to his left knee and other parts.

8. At the time and place aforesaid, Defendant, by and through its agents and employees, was then and there guilty of one or more of the following acts of negligence in violation of the Federal Employers' Liability Act, Title 45, Section 51-60 of the United States Code:

A. Failure to adopt, install, implement and enforce a safe method and procedure for periodic inspection, maintenance and upkeep of the area described.

B. Failure to properly inspect, maintain, and clean its walkways, work areas and properties used by its employees for ingress and egress or for working areas so that the same became hazardous to the safe footing of its employees.

C. Failure to establish proper procedures for the removal of snow and ice and for the application of sand or salt on snow packed and icy areas.

D. Failure to warn or otherwise signal the presence and hazardous nature of the walkway due to the accumulation of ice and snow.

E. Finally, failure to provide plaintiff that reasonably safe place to work required by law in such cases made and provided.

9. One or more of the aforesaid wrongful acts of Defendant in whole or in part contributed to injure Plaintiff, both externally and internally, in and about his left knee and other parts of his body with resultant past, present and future pain, suffering, discomfort, physical impairment, anxiety, total disability, permanent partial disability, diminution of earning capacity, partial loss of enjoyment of living, medical and hospital expense and wage loss, some of which conditions are permanent in nature.

That by reason of the facts hereinabove set forth and as a direct result thereof, as aforesaid, Plaintiff has been generally damaged in an amount to be proven at time of trial.

WHEREFORE, Plaintiff prays judgment against Defendant in an amount established by the evidence, interest, costs and whatever other relief this Court deems appropriate, together with such special damages as may be hereafter ascertained, and for his costs of suit incurred herein, interest on said damages as allowed by law, expert witness fees and other relief this Honorable Court deems just and proper.

REQUEST FOR JURY TRIAL

PLAINTIFF DEMANDS A JURY TRIAL TO HEAR ALL ISSUES CONTAINED HEREIN.

Dated this 11th day of August, 1989.

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By: /s/ Robert S. Fain, Jr.
Co-counsel for Plaintiff

MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT, YELLOWSTONE COUNTY

Cause No. DV: 89-975

Judge: WILLIAM J. SPEARE

THOMAS L. JOHNSON,
Plaintiff,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation,
Defendant.

COMPLAINT AND REQUEST FOR JURY TRIAL

COMES NOW the Plaintiff, Thomas L. Johnson, by his attorneys, Gary K. Wood and Robert S. Fain, Jr., and for his complaint against Defendant, Burlington Northern Railroad Company, a corporation, states:

1. Plaintiff brings this action under the provisions of Title 45, Sections 1-60 of the United States Code, regulations promulgated under the authority of those sections, and other Federal Safety laws which have been incorporated herein by decision; of which Sections 51-60 commonly known and referred to as the Federal Employers' Liability Act and under the terms of that Act this Court has jurisdiction.

2. At all times herein mentioned Defendant was a corporation engaged in the business of owning, maintaining and operating a line and system of railroad which extended in part through Billings, Montana.

3. At all times herein mentioned Defendant was an interstate carrier by rail and was engaged in interstate transportation and commerce.

4. At the time of the occurrence for which this action is brought Plaintiff was employed by Defendant as its servant and employee and part or all of Plaintiff's duties were in the furtherance of interstate commerce or directly, closely and substantially affected interstate commerce.

5. Both Plaintiff and his employer, the Defendant herein, were engaged in interstate commerce within the meaning of the Federal Employers' Liability Act and their mutual rights and liabilities were governed and controlled by that Act at the time of the occurence for which this action is commenced.

6. On or about August 22, 1987, at approximately 3:30 p.m., Plaintiff was engaged in performing the duties of his employment, namely that of a locomotive engineer, in or about the Defendant's premises in Sheridan, Wyoming.

7. At the time and place aforesaid, while in the process of reporting to work and was driving his motorcycle on a railroad access road to the point where he was to report for duty, Plaintiff was caused to suffer injuries to his left knee.

8. At the time and place aforesaid, Defendant, by and through its agents and employees, was then and there guilty of one or more of the following acts of negligence in violation of the Federal Employers' Liability Act, Title 45, Section 51-60 of the United States Code:

A. Failure to adopt, install, implement and enforce a safe method and procedure for periodic inspection, maintenance and upkeep of the area described.

B. Failure to properly inspect, maintain, and repair its roadways and properties used by its employees for ingress and egress so that the same became hazardous to the safe travel of its employees.

C. Failure to properly inspect, maintain and process its properties so that the same could be used with safety by its employees.

D. Failure to warn or otherwise signal the presence of dirt piles created by the repair of the Defendant's roadway.

E. Finally, failure to provide plaintiff that reasonably safe place to work required by law in such cases made an [sic] provided.

9. One or more of the aforesaid wrongful acts of Defendant in whole or in part contributed to injure Plaintiff, both externally and internally, in and about his left knee with resultant past, present and future pain, suffering, discomfort, physical impairment, anxiety, total disability, permanent partial disability, diminution of earning capacity, partial loss of enjoyment of living, medical and hospital expense and wage loss, some of which conditions are permanent in nature.

That by reason of the facts hereinabove set forth and as a direct result thereof, as aforesaid, Plaintiff has been generally damaged in an amount to be proven at time of trial.

WHEREFORE, Plaintiff prays judgment against Defendant in an amount established by the evidence, interest, costs and whatever other relief this Court deems appropriate, together with such special damages as may be hereafter ascertained, and for his costs of suit incurred herein, interest on said damages as allowed by law, expert witness fees and other relief this Honorable Court deems just and proper.

REQUEST FOR JURY TRIAL

PLAINTIFF DEMANDS A JURY TRIAL TO HEAR ALL ISSURES [sic] CONTAINED HEREIN.

Dated this 11th day of August, 1989.

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Billings, MT 59103-1977

By: /s/ Robert S. Fain
Co-counsel for Plaintiff

MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT, YELLOWSTONE COUNTY

SHERIFF'S RETURN

511-19

OFFICE OF THE SHERIFF

STATE OF MONTANA
COUNTY OF LEWIS AND CLARK

I hereby certify that I received the annexed Summons on the 17th day of August, 1989, and personally served the same on the 17th day of August, 1989, upon Burlington Northern Railroad Company by delivering to Stuart Kellner, Agent for C. T. Corporation Systems and authorized to accept service of process for Burlington Northern Railroad Company at 406 Fuller Avenue, Helena, Montana at 1050 hours personally in the County of Lewis and Clark, a true and correct copy of said Summons and Complaint; Request for Production of Documents and Interrogatories in re: Cause No. 89-974 and informing him of the contents thereof.

Received by ——— this —— day of ———, 19——

I hereby certify that after diligent search and inquiry of divers persons in sundry places I am unable to find in Lewis and Clark County, State of Montana, ———

———

———, being the ——— named in ———

———

Dated at Helena, Montana, this 17th day of August, 1989.

Service ... $23.00
Mileage ... $ 1.00
Total ... $24.00—pd

CHARLES M. O'REILLY
Sheriff

/s/ Nancy Fillinger
Civil Secretary

MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT, YELLOWSTONE COUNTY

SHERIFF'S RETURN

511-19

OFFICE OF THE SHERIFF

STATE OF MONTANA
COUNTY OF LEWIS AND CLARK

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Received by _____ this ____ day of _____ 19____

I hereby certify that after diligent search and inquiry of divers persons in sundry places I am unable to find in Lewis and Clark County, State of Montana, _____

_____

_____, being the _____ named in _____

_____

Dated at Helena, Montana, this 17th day of August, 1989

Service ... $23.00
Mileage ... $ 1.00
Total ... $24.00—pd

CHARLES M. O'REILLY
Sheriff

/s/ Nancy Fillinger
Civil Secretary

MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT, YELLOWSTONE COUNTY

No. DV 89-974

JUDGE RUSSELL K. FILLNER

WILLIAM D. FORD,
Plaintiff,

-v-

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation,
Defendant.

MOTION FOR CHANGE OF PLACE OF TRIAL

(Section 25-2-114, M.C.A.; Section 25-2-118 M.C.A.; Rule 12(b)(ii), M.R. Civ. P.)

COMES NOW Defendant Burlington Northern Railroad Company ("BN") and moves pursuant to Mont. Code Ann. Section 25-2-114 for an order changing the place of trial to and transferring venue to Hill County, Montana, BN's principal place of business in Montana, on the grounds that Yellowstone County is not the proper county for trial of this action and, insofar as Mont. Code Ann. Section 25-2-118 permits trial against BN in Yellowstone County, that provision discriminates against corporations not incorporated in Montana in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Dated this 6th day of September, 1989.

KURT W. KROSCHEL & ASSOCIATES

By: /s/ R. D. Yerger
RUSSELL D. YERGER
Of attorneys for Defendant
Burlington Northern Railroad
Company

(Certificate of Service Omitted in Printing)

MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT, YELLOWSTONE COUNTY

No. DV 89-975

JUDGE WILLIAM J. SPEARE

THOMAS L. JOHNSON,
Plaintiff,

-v-

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant.

MOTION FOR CHANGE OF PLACE OF TRIAL

(Section 25-2-114, M.C.A.; Section 25-2-118, M.C.A.; Rule 12(b)(ii), M.R. Civ. P.)

COMES NOW Defendant Burlington Northern Railroad Company ("BN") and moves pursuant to Mont. Code Ann. Section 25-2-114 for an order changing the place of trial to and transferring venue to Hill County, Montana, BN's principal place of business in Montana, on the grounds that Yellowstone County is not the proper county for trial of this action and, insofar as Mont. Code Ann. Section 25-2-118 permits trial against BN in Yellowstone County, that provision discriminates against corporations not incorporated in Montana in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Dated this 6th day of September, 1989.

KURT W. KROSCHEL & ASSOCIATES

By: /s/ R. D. Yerger
RUSSELL D. YERGER
Of attorneys for Defendant
Burlington Northern Railroad
Company

(Certificate of Service Omitted in Printing)

MONTANA THIRTEENTH JUDICIAL DISTRICT
COURT, YELLOWSTONE COUNTY

No. DV 89-974

JUDGE RUSSELL K. FILLNER

WILLIAM D. FORD,
Plaintiff,

-v-

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware corporation,
Defendant.

AFFIDAVIT

STATE OF MONTANA)
) ss.
COUNTY OF HILL)

Mark C. Bruce, being duly sworn upon oath deposes and states as follows:

1. I serve as Director, Operations Services, for the Montana Division of the Burlington Northern Railroad ("BN"). In that capacity, I am responsible for overseeing the Montana Division's 100 million dollar annual operating budget, administration, payroll and personnel in the State. I therefore have first-hand knowledge of the structure of BN's Montana Division.

2. BN's principal place of business in Montana is at Havre, in Hill County. The Division office for the Montana Division is located in Havre and directs railroad operations throughout the State. The General Manager

for the Division is Wayne Eisenman, who answers directly to the Regional Vice President.

3. About 900 of BN's 1700 employees in the State work in Havre. More than 35 management positions are located in Havre.

4. BN's Montana Division handles its payroll function in Havre and maintains its payroll and personnel files there. BN's Montana Division also tests and repairs its equipment in Havre and maintains files relating to that function in Havre.

5. Although BN at one time maintained several lines in Yellowstone County, the bulk of that track has now been sold or leased to Montana Rail Link. The Laurel Yard is also operated by Montana Rail Link.

6. BN has closed its dispatching operations and regional and divisional offices in Yellowstone County.

/s/ Mark C. Bruce
MARK C. BRUCE

SUBSCRIBED AND SWORN to before me this 4th day of October, 1989.

/s/ [Illegible]
Notary Public for the State of
Montana
Residing at: Havre, Mont.
My Commission Expires:
7-14-92

(NOTARIAL SEAL)

(Certificate of Service Omitted in Printing)

FILED
MAR 9 1992
OFFICE OF THE CLERK

No. 91-779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

WILLIAM D. FORD,
Respondent.

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

THOMAS L. JOHNSON,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Montana

---

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a state venue law which provides that nonresident corporations may be sued in any county in the state, whereas resident corporations may be sued only in their county of residence, violates the Equal Protection Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

All parties to the proceeding below are identified in the caption of this petition.

Burlington Northern, Inc., is the parent company of petitioner Burlington Northern Railroad Company. The partially owned subsidiaries of petitioner Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and Northern Western Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
M T Properties, Inc.
Northern Radio Ltd.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-779

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

WILLIAM D. FORD,
Respondent.

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

THOMAS L. JOHNSON,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Montana

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision and order of the Montana Supreme Court is reported at 819 P.2d 169 (1991) and is reproduced in Petitioner's Appendix ("Pet. App.") at 1a to 15a. The two unreported decisions and orders of the Yellowstone County trial courts are reproduced respectively at Pet. App. 16a and 18a.[1]

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[1] This litigation began as two separate cases, *William D. Ford v. Burlington Northern R.R.*, No. DV-89-974, and *Thomas L. Johnson v. Burlington Northern R.R.*, No. DV-89-975, both brought in

JURISDICTION

The decision and order of the Supreme Court of the State of Montana was entered on August 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

STATUTORY PROVISIONS INVOLVED

The applicable Montana venue statute, Mont. Code Ann. § 25-2-118 (1989) ("MCA"), is set forth verbatim at Pet. App. 26a. Most pertinent, subsections (1) and (2) of the statute provide:

> (1) the proper place for trial for all civil actions is the county in which the defendants or any of them reside at the commencement of the action;
>
> (2) if none of the defendants reside in the state, the proper place of trial is the county the plaintiff designates in the complaint; . . . .

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

STATEMENT OF THE CASE

This petition concerns the applicability of the Equal Protection Clause of the Fourteenth Amendment to discrimination in state court venue. Montana's general venue statute discriminates in a real and substantial way against out-of-state corporations, permitting suits to be filed against them in any county in the state, while tightly restricting venue against Montana corporations.

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the Montana Thirteenth Judicial District Court, Yellowstone County. Two different judges of the trial court issued two separate decisions, but those two decisions were identical in substance, and the Supreme Court of the State of Montana consolidated the cases and decided them together.

A. The Montana Venue System

The Montana venue system giving rise to this case consists of three basic elements. First, the applicable venue statute, MCA § 25-2-118, predicates selection of venue on the county of residence of the defendant. This statute was enacted in 1864 by Montana's First Territorial Legislative Assembly and has remained essentially the same since.[2] Under MCA § 25-2-118, residents of the state may be sued only in their county of residence, but non-residents may be sued in any county in the state the plaintiff chooses. Pet. App. 26a. A tort action may also be brought in the county in which the tort is alleged to have occurred. MCA § 25-2-122. Thus, in a tort case against a resident of Montana, the plaintiff will be limited to two counties if the tort was committed in the state, and is limited to only one county if it occurred outside Montana. On the other hand, for an identical case involving a non-resident defendant, the plaintiff will always have the choice of any of Montana's fifty-six counties.[3]

Second, under controlling state decisional law, an out-of-state corporation may not acquire "resident" status for purposes of the venue distinction in MCA § 25-2-118 between residents and non-residents. Even a corporation that has established a fixed place of business in the state and designated an agent for receipt of service of process in a particular county in the state cannot acquire a Mon-

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[2] MCA § 25-2-118 (1989) (originally enacted as En. Sec. 20, p. 46, Bannack Stat., 1864; amended Sec. 8, Ch. 432, L. 1985; redesignated 25-2-118 by Code Commissioner, 1985). *See* Statutory Appendix, *infra*, at 1a (quoting statute as originally enacted and as presently codified).

[3] For a brief period, tort actions against non-residents were required to be brought in the county where the tort was alleged to have occurred. *McAlear v. Kasak*, 225 Mont. 113, 731 P.2d 908 (1987). However, the Montana Supreme Court overruled itself on this point and held that a tort case against a non-resident may be brought in any county. *Haug v. Burlington N. R.R.*, 236 Mont. 368, 770 P.2d 517, 519 (1989) (citations omitted).

tana residence under the venue statute. *E.g.*, *Haug*, 770 P.2d at 519.

Third, Montana maintains an "open door" policy which permits out-of-state plaintiffs to sue in Montana state courts, even when the alleged injuries occurred outside the State.[4] The net result of this system is that out-of-state corporations may be sued anywhere in the state, either by in-state or out-of-state plaintiffs, whereas venue against Montana corporations is far more restricted.[5]

B. The Proceedings Below

BN is a corporation organized under the laws of the State of Delaware, with its principal place of business in Fort Worth, Texas. BN operates rail lines in twenty-five states, including Montana, and has its Montana headquarters and principal place of business in Hill County.[6] As required by Montana law, BN has also designated a registered agent for service of process in Montana: CT Corporation Systems, located in Helena in Lewis and

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[4] *E.g.*, *Haug*, 770 P.2d at 521 (citations omitted); *State ex rel. Burlington N. R.R. v. Eighth Judicial Dist. Court*, 229 Mont. 325, 746 P.2d 1077, 1080 (1987); *Bevacqua v. Burlington N., Inc.*, 183 Mont. 237, 598 P.2d 1124, 1125 (1979); *Labella v. Burlington N. R.R.*, 182 Mont. 202, 595 P.2d 1184, 1187 (1979).

[5] The disparity is exacerbated in actions brought under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988). Under Montana law, the doctrine of forum non conveniens is specifically not available to defendants in FELA actions, as it is to defendants in civil actions arising under state law. MCA § 25-2-201 (1987); *see Haug*, 770 P.2d at 521 (citations omitted). Thus, a FELA plaintiff has a unilateral and absolute right to select any Montana state court for trial of his or her case—even when the plaintiff, the site of the accident, and all of the fact witnesses are outside the state.

[6] Pet. App. 4a; JA 20-21, Affidavit of Mark C. Bruce. Hill County is in the north of Montana. Yellowstone County, where the underlying actions were brought, is in the southern part of the state, over 300 miles away.

Clark County, Montana. *See* MCA § 35-1-1012 (requiring designation of a "registered agent" for service of process).

The two underlying actions were brought against BN under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (1988). In each case, process was served on BN's registered agent in Montana. JA 13-16. Each action was filed in state district court in Yellowstone County, Montana. BN has some trackage in Yellowstone County but, as noted above, its principal place of business in the State is in Hill County. In each case below, the plaintiff was a resident of Sheridan, Wyoming, and was allegedly injured while working on BN's railroad premises in Sheridan. The lead counsel for both plaintiffs was a law firm located in Colorado. Thus, the actions were brought in a selected Montana state court by out-of-state counsel, representing out-of-state plaintiffs, alleging out-of-state injuries.

In each case, BN moved for change of venue from Yellowstone County to Hill County.[7] In so moving, BN challenged the constitutionality of the Montana venue statute on equal protection grounds, claiming invidious discrimination as between domestic and out-of-state corporations. JA 17-19. BN relied principally on this Court's decision in *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927), which held that the Equal Protection Clause does not permit a state venue law to discriminate between domestic corporations and foreign corporations with a fixed place of business and a registered agent in the state. The Yellowstone County trial courts denied BN's venue motions, following controlling state law that "a foreign corporation has no county of residence for venue purposes and can be sued in any county selected by the plaintiff." Pet. App. 21a (citations omitted). The trial courts did not mention *Saunders*, but upheld the constitutionality

[7] Under MCA § 25-2-201(1), a change of venue is required only "when the county designated in the complaint is not the proper county . . . ."

of the venue statute, referring to "the hazardous conditions surrounding the railroad industry," and finding no disparate treatment because "[a]ll railroads incorporated in other states and doing business in Montana are treated similarly and can be sued in any county the plaintiff chooses." Pet. App. 17a, 24a.

On appeal, the Montana Supreme Court affirmed. The court declined BN's express invitation to construe the Montana venue statute so as to permit a foreign corporation with a principal place of business and a registered agent in the state to acquire a residence for purposes of venue. Pet. App. 5a-6a. The court below then turned to the constitutional issue, attributing to this Court the view that "the Fourteenth Amendment does not guarantee citizens the right to have disputes determined in one forum, as opposed to another." Pet. App. 6a (citing *Cincinnati St. Ry. v. Snell*, 193 U.S. 30, 36-37 (1904)). The court below acknowledged this Court's decision in *Saunders* holding that the Equal Protection Clause applies to matters of state court venue, but the court expressed doubt "whether *Saunders* continues to be good law." Pet. App. 11a.

The Montana Supreme Court expressly declined to address the fundamental equal protection issue: whether the Montana venue statute has "a rational basis for treating all out-of-state corporations differently from all domestic corporations . . . ." Pet. App. 9a. Nor did the court below identify any purpose in state law or policy for the statutory distinction. Instead, the court focused on a perceived federal policy which it found to be embodied in the FELA, allowing railroad workers maximum flexibility in their choice of forum, and found that this national policy offers "a justification for disparate treatment in this case . . . ." Pet. App. 11a. The decision below also found that no real discrimination arose in the operation of the Montana venue statute, because it assumed BN could have been sued in the federal district court for Montana, which sits in Yellowstone County

among other places. Pet. App. 15a.[8] BN petitioned for a writ of certiorari, which this Court granted.[9]

SUMMARY OF ARGUMENT

By its language, origin, and history, the Equal Protection Clause of the Fourteenth Amendment forbids discrimination in state judicial systems. Shortly after this Court held that the Equal Protection Clause protects the rights of corporations as well as individuals, it also held that the Clause prohibits discrimination against corporate litigants in state court systems. The development of this principle was crystallized in this Court's decision in *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927). That case holds squarely that equal protection is violated by a state venue law that permits an out-of-state corporate defendant with a fixed place of business and a registered agent to be sued in any county of the state, but permits a domestic corporation to be sued only in its designated county of residence.

Under *Saunders*, a foreign corporation with a fixed place of business and a designated agent for service of process in the state must be treated in the same way as a domestic corporation. This is consistent with a host of other equal protection cases involving out-of-state corporations, holding that a state may take reasonable steps to place them on equal footing with domestic corporations, but may not then discriminate against them.

The discrimination in the Montana venue system against out-of-state corporations bears no rational basis related to a legitimate state purpose. The court below

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[8] Section 56 of the FELA provides for concurrent state and federal court jurisdiction, and permits a defendant railroad to be sued in any federal district in which it is currently doing business. 45 U.S.C. § 56 (1988).

[9] The decision below is "final" and reviewable. *See American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 642 n.3 (1976); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963).

identified no underpinning for the statute in state law or policy. Neither the 1864 statute itself, nor its negligible legislative history, suggests any specific purpose. If anything, the statute appears to have focused on individual defendants. In 1926, the Montana Supreme Court adopted the view that a foreign corporation could have no residence in the state for purposes of venue. That decision did not cite any policy at all, but rather the absence of any legislative provision modifying the already outdated common law notion that a corporation could not migrate from the jurisdiction of its creation. None of this justifies the infliction of unlimited venue on out-of-state corporations.

The only rationale for the Montana venue statute suggested by respondents and adopted by the court below is the supposedly pro-plaintiff policy of the FELA. This is an incorrect interpretation of that federal legislation, and certainly no justification for a distinction in state law between foreign and domestic corporate defendants—a discrimination that exists whether the action is based on the FELA or not. The inescapable conclusion is that the Montana venue rule has no purpose other than to disadvantage out-of-state corporations as against their domestic counterparts.

Nor can the discrimination here be dismissed as inconsequential because it is "only" related to venue. In fact, venue is often critical in civil litigation: it determines what kind of jury will be impanelled, who the judge will be, and what local law will apply. The unmistakable effect of the double standard in the Montana venue statute is to subject out-of-state corporations to a rampant form of forum shopping from which Montana corporations are officially immunized by state law. Assuming rational behavior on the part of plaintiffs' counsel, this permits plaintiffs (even out-of-state plaintiffs with out-of-state injuries) to exact a higher price from foreign corporations than they could from Montana corporate defendants.

Wide-open forum shopping is made far more acceptable politically when it is imposed solely on a selected class of out-of-state defendants, because local businesses would strongly protest such treatment. Existing equal protection precedent forbids such an abuse, and therefore it must be put to an end.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE FORBIDS DISCRIMINATION IN STATE JUDICIAL SYSTEMS AGAINST FOREIGN CORPORATIONS

This Court squarely held in *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927), that the Equal Protection Clause forbids discrimination in state court venue as between domestic corporations and foreign corporations with a fixed place of business and registered agent for service of process in the state. Review of the text, purpose, and development of the Equal Protection Clause reveals that *Saunders* has deep roots and a solid place in the modern constitutional order.

A. The Origin And Early Development Of The Equal Protection Clause Evince A Purpose To Ensure Procedural Equality In The State Courts

The Equal Protection Clause guarantees that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Much of the development of equal protection jurisprudence has focused on the need for equality in substantive legislation. The text of the clause, however, speaks not of "protection of equal laws" but of "equal protection of the laws." This language evinces a core purpose of the Fourteenth Amendment: to ensure the equality of justice in the state court systems.

The origin and early development of the Equal Protection Clause confirm that one of its main purposes was to eliminate the operation of double standards in state

courts. The text of the clause was based largely on the Civil Rights Act of 1866, which was specifically targeted to annul the post-Civil War Black Codes that imposed numerous disabilities on freedmen in state court proceedings.[10] Thus, section 1 of that Act guaranteed all citizens "the same right . . . to *sue, be parties, and give evidence* . . . and to *full and equal benefit of all laws and proceedings*. . . ."[11] The Equal Protection Clause adopted both the concepts and language of this legislation. The legislative history of Section 1 of the Civil Rights Act of 1871 provides further confirmation that a primary purpose of the Fourteenth Amendment was to end discrimination in the state court systems. *E.g., Mitchum v. Foster*, 407 U.S. 225, 240 (1972).[12]

In the years after its ratification, the Equal Protection Clause became established as a vital constitutional check on discrimination against foreign corporations within state court systems. In *Santa Clara County v. Southern Pac. Ry.*, 118 U.S. 394, 396 (1886), this Court held that the Clause applies to corporations as well as to individuals.[13] Shortly thereafter, this Court invoked the Equal

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[10] *See* Horace E. Flack, *The Adoption of the Fourteenth Amendment* 20 (1908); John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Colum. L. Rev. 131, 145 (1950).

[11] 14 Stat. 27 (1866) (emphasis added). In 1870, Congress reenacted a portion of the Civil Rights Act of 1866 pursuant to the power conferred by § 5 of the Fourteenth Amendment. 16 Stat. 140. The reenactment contains essentially the language that now appears in 42 U.S.C. § 1981 (1988). *See generally General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 386-87 (1982).

[12] During the debates on the Civil Rights Act of 1871, Senator Osborn, for example, remarked that " 'We are driven by existing facts to provide for the several states in the South what they have been unable to fully provide for themselves; *i.e.*, the full and complete administration of justice in the courts.' " *Id.* at 240-41 (quoting Cong. Globe, 42d Cong., 1st Sess. 653 (1871)).

[13] In the same year, the Court decided *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In that case, a facially neutral ordinance re-

Protection Clause to assure the fairness of state court proceedings for corporate defendants. In two cases, the Court held that an attorneys fees remedy cannot be imposed in state court on railroads when it is not imposed on other litigants in similar circumstances. *Atchison, T. & S.F. Ry. v. Vosburg*, 238 U.S. 56 (1915); *Gulf, Colorado & S.F. Ry. v. Ellis*, 165 U.S. 150 (1897). These cases focused directly on the need for equality in ground rules for resolving disputes in the state courts:

> [The railroads] cannot appeal to the courts as other litigants under like conditions and with like protection. . . . They do not enter the courts upon equal terms . . . . In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection.

Gulf, Colorado & S.F. Ry. v. Ellis, 165 U.S. at 153.

A few years later, the Court recognized that foreign corporations could not receive discriminatory treatment in the state courts in violation of the Equal Protection Clause. In *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U.S. 544 (1923), the Court invalidated a state law that imposed a more onerous burden on foreign corporations than on other litigants, including domestic corporations, with respect to the geography and logistics of discovery. Under the Wisconsin statute there at issue, a party that was a foreign corporation could be compelled to have its officer travel to any in-state location selected by its opponent in order to attend a deposition, whereas a domestic corporation or an individual could require the deposition to be taken at its own county of residence. *Id.* at 548-49. This Court rejected the view of

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quired "special permission" from a Board for certain kinds of laundries. In fact, permission was always denied to Chinese applicants, but not to other applicants. The Court found an Equal Protection violation, thus confirming that the Equal Protection Clause assured fairness in the *administration* of the laws.

the court below that discrimination against the foreign corporation was permissible:

> No doubt a corporation of one State seeking relief in the courts of another must conform to the prevailing modes of proceeding in those courts and submit to reasonable rules respecting the payment of costs or giving security therefor and the like . . . but it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact and not laid on other suitors in like situations.

Id. at 551. Thus, the Fourteenth Amendment assured all litigants who appear in the state courts—whether individual or corporate, domestic or foreign—that they would receive equal justice.

B. The Equal Protection Clause Specifically Protects Foreign Corporations From Discrimination In State Court Venue

The precise question at issue in this case—whether the Equal Protection Clause is violated by a state law providing broader venue for suits against foreign corporations than domestic corporations—was decided by this Court in 1927 in *Power Mfg. Co. v. Saunders*, 274 U.S. 490. In that case, this Court squarely held that a state could not distinguish for venue purposes between a domestic corporation and a foreign corporation with a fixed place of business and a registered agent for service of process in the state.

In *Saunders*, a domestic corporation in Arkansas could be sued only where it had a place of business or where its chief officer resided, but a foreign corporation could be sued in any county in the state. 274 U.S. at 492-93. The defendant, an Ohio corporation, conducted business in the state solely in Arkansas County, where it maintained a warehouse and had a designated agent for service of process. *Id.* at 491. When injured in the de-

fendant's warehouse, the plaintiff sued elsewhere, in Saline County. *Id.*

The *Saunders* Court directly addressed the question whether equal protection applies to discrimination in state court venue. An earlier case, *Cincinnati St. Ry. v. Snell*, 193 U.S. 30, 36-37 (1904), had upheld a state venue law against equal protection challenge. The statute in *Snell* permitted an individual to obtain a transfer of venue under specified circumstances indicating the possibility of jury bias in favor of a corporation with its principal place of business in the county, but provided no opportunity for transfer at the request of the corporation. *Id.* at 34.[14] The *Saunders* Court categorically rejected the proposition, which had been urged on the basis of *Snell*, that venue rights are "beyond the reach of the equal protection clause," and held that *Snell* was simply a case in which the particular legislative classification had a rational and legitimate basis. 274 U.S. at 495-96.

In *Saunders*, the Court found that there was "real and substantial" discrimination because the Arkansas statute made a foreign corporation subject to suit "not merely in that county [of its place of business within the state], but in any of the 74 other counties" in the state, whereas domestic corporations enjoyed advantageously confined venue. 274 U.S. at 493. The Court then pronounced that

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[14] Specifically, the statute in *Snell* provided:

> When a corporation having more than fifty stockholders is a party in action pending in a county in which the corporation keeps its principal office, or transacts its principal business if the opposite party make affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties.

Id. at 34. The decision upholding this statutory provision—which was plainly designed to eliminate the prejudice arising from a venue favorable to a local corporation—provides no support for a state law allowing plaintiffs broader venue in which to find a forum prejudicial to a foreign corporation.

such venue discrimination against out-of-state corporations could be permitted only if "based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation." *Id.* at 493 (citations omitted).

The *Saunders* Court posed the case as one involving "foreign corporations doing business within the state by her permission, and therefore having a fixed place of business therein and a resident agent on whom process may be served." *Id.* at 494. The Court recognized that "considerations of convenience and economy" might well motivate the restriction of venue for domestic corporations, but concluded that "these considerations have equal application to foreign corporations." *Id.* Therefore, the Court found no rational basis for the Arkansas statute, and struck it down, stating that "there is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or natural person." *Id.*

Justice Holmes, joined by Justice Brandeis, dissented. Justice Holmes did not disagree with the majority's treatment of *Snell* or with its conclusion that the Equal Protection Clause could protect against discrimination in state venue rules. Rather, he reasoned that, in view of the state's power to exclude foreign corporations from its borders, it could force the corporation to agree to give up its constitutional right to equal treatment. 274 U.S. at 497-98. This concept of the state's exclusion power had largely been discarded by the time of the *Saunders* decision,[15] and has been decisively rejected since.[16]

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[15] *E.g., Western Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910); *Pullman Co. v. Kansas*, 216 U.S. 56 (1910); *Southern Ry. v. Greene*, 216 U.S. 400 (1910). Justice Holmes dissented in each of these cases.

[16] *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. at 656-68. *See also Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 874-75 (1985).

Justice Holmes also reasoned that a foreign corporation "having its works elsewhere" would not be incrementally inconvenienced by setting venue in one county rather than another. 274 U.S. at 498. The majority, however, noted that the defendant foreign corporation had a "fixed place of business" in the state. *Id.* at 494. As the majority pointed out, Justice Holmes' observation did not apply to the defendant in that case, nor to other corporations with a fixed place of business and a resident agent:

> We speak only of them. So far as their situation has any pertinence to the venue of transitory actions, it is not distinguishable from that of domestic corporations and individuals.

Id. at 494. Thus, *Saunders* established a rule of simple equality in state court venue as between domestic corporations and foreign corporations with a registered agent and fixed place of business within the state.

In the years following *Saunders*, most states have come into compliance with this rule. Several statutes similar to Montana's have been struck down on equal protection grounds and on the authority of *Saunders*.[17] A number of other states have achieved constitutional compliance through statutory construction. The supreme courts of these states have interpreted statutes that establish broader venue for non-residents than for residents to permit an out-of-state corporation to acquire residence by maintaining a place of business in the state and designating an agent for service of process, thus eliminating any inequality in practice.[18] Similarly, a few states with

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[17] *Philco-Ford Corp. v. Holland*, 548 S.W.2d 828, 829 (Ark. 1977) (venue statute discriminating between domestic and foreign corporate defendants in contract actions); *Windham v. Pace*, 6 S.E.2d 270 (S.C. 1939) (domestic versus foreign motor carrier corporations); *Henry Fisher Packing Co. v. Mattox*, 90 S.W.2d 70 (Ky. 1936) (same).

[18] *Banning v. Minidoka Irrig. Dist.*, 406 P.2d 802 (Idaho 1965); *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (Mo. 1962); *Com-*

such venue statutes have provided by statute that an out-of-state corporation may acquire a residence in the state for purposes of state court venue.[19] Many states, of course, simply do not have venue statutes that authorize broader venue for non-residents. Thus, with few exceptions, the *Saunders* principle has been incorporated into the law of states across the nation.[20]

Contrary to the Montana court's belief, subsequent decisions of this Court have in no way undermined the clear holding of *Saunders*. To be sure, other particular venue distinctions—such as between individuals and corporations—have been found to have a rational basis,[21] and minor variations between foreign and domestic corporations have been upheld when they are shown to have no real discriminatory effect. *See, e.g., American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976), discussed *infra* at 34-36. But the core conclusion of *Saunders*—

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mercial Carriers, Inc. v. Matracia, 311 S.W.2d 565 (Ky. 1958); *Hale v. Bohannon*, 241 P.2d 4 (Cal. 1952) (en banc); *Smith v. Utah Home Fire Ins. Co.*, 47 N.W.2d 785 (Minn. 1951); *Hill v. Atlantic Greyhound Corp.*, 51 S.E.2d 183 (N.C. 1949); *Forman v. Mississippi Publishers Corp.*, 14 So. 2d 344 (Miss. 1943); *Hirsch v. Shepherd Lumber Corp.*, 20 S.E.2d 575 (Ga. 1942); *see also Zolper v. AT&T Info. Sys., Inc.*, 709 S.W.2d 74 (Ark. 1986) (different statute than the one in *Saunders*).

[19] *See* Me. Rev. Stat. Ann. tit. 4, § 155 (West 1989); Neb. Rev. Stat. § 25-403.02 (1989); Or. Rev. Stat. § 14.080 (1989). One state has achieved the same result by a constitutional amendment providing that a foreign corporation may be sued only in those counties where such a suit would be allowed if it were a domestic corporation. Ala. Const. Art. XII, § 232.

[20] In *State ex rel. Blackledge v. Latourette*, 205 P.2d 849, 850, 856 (Or. 1949), the Oregon Supreme Court upheld the constitutionality of a statute establishing broader venue for non-residents than for residents, as applied to a foreign corporation that did *not* have a fixed place of business in the state. That statute has since been amended to eliminate the disparate treatment. *See supra*, at 16 n.19.

[21] *See Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1931).

that there is no rational basis for a difference between domestic corporations and foreign corporations with a registered agent and fixed place of business in the state—has remained solidly in effect.

C. The *Saunders* Principle Of Equality For Foreign Corporations In State Courts Has Been Instrumental In The Subsequent Development of the Equal Protection Clause

Saunders established that foreign corporations having a fixed place of business and a registered agent must be treated like domestic corporations for purposes of state court venue. This principle fits snugly into a broader body of law concerning equal protection for out-of-state corporations. This Court has permitted reasonable state regulation of foreign corporations designed to give them the functional attributes of domestic corporations, so that foreign corporations would be equally amenable to service of process and execution of judgments in state court litigation. Once an out-of-state corporation has been "domesticated" in this way, though, the case law has required it to be treated equally.

Initially, foreign corporations were viewed as having no legal existence outside of the state in which they were chartered. *See St. Clair v. Cox*, 106 U.S. 350, 354 (1882). As interstate activity by corporations became more common, this Court's decisions enabled the states to put foreign corporations on an equal plane with domestic corporations for purposes of litigation. For example, a state could require that the foreign corporation file copies of its charter with the state as a condition precedent to suing in the state's courts. *Interstate Amusement Co. v. Albert*, 239 U.S. 560, 567-68 (1916). A state could also require a foreign corporation or domestic corporation lacking a principal office within the state to appoint the state auditor as an agent. *St. Mary's Franco-Am. Petroleum Co. v. West Virginia*, 203 U.S. 183 (1906). The Court explained:

> In this instance [the statute] put all nonresident domestic corporations, which elected to have their places of business and works outside of the State, and all foreign corporations coming into the State, on the same footing in respect of the service of process, and the law operated on all these alike.

Id. at 191.[22] Similarly, foreign insurance corporations with fewer assets in the state could be required to post higher levels of security to assure equivalent potential for satisfaction of judgments. *South Carolina ex rel. Phoenix Mut. Life Ins. Co. v. McMaster*, 237 U.S. 63, 73-74 (1915). Even foreign corporations that left the state remained subject to the requirement of an appointed agent. *Washington ex rel. Bond & Goodwin & Tucker v. Washington Superior Court*, 289 U.S. 361, 364-65 (1933) (citing *Saunders*).

Having taken these steps to assure equivalent amenability to process and execution, however, the Court refused to allow discrimination against foreign corporations in venue provisions. Thus, in *Saunders*, the Court explained:

> No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, the distinguishing principle being that classifi-

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[22] *Accord Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (statute appointing registrar as agent for service of process on nonresident motorists "makes no hostile discrimination against nonresidents but tends to put them on the same footing as residents"); *Kane v. New Jersey*, 242 U.S. 160, 167 (1916) (similar statute does not violate equal protection because it "puts nonresident owners upon an equality with resident owners").

> cation must rest on differences pertinent to the subject in respect of which the classification is made.

274 U.S. at 494. In a legal universe that required foreign corporations to assume the essential attributes of domestic corporations, the Court could see no pertinent differences, for purposes of venue, between a domestic corporation and a foreign corporation with a fixed place of business and a registered agent. In short, once the incidents of domestication have been imposed upon a foreign corporation with respect to judicial proceedings, further unequal impositions are unconstitutional.

A more recent case confirms this analysis. In *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), the Court upheld against an equal protection challenge a state law that tolled the statute of limitations only for actions against foreign corporations that did not designate registered agents for service of process in the state. *Id.* at 412-14.[23] In its decision, the Court stressed the differences between an "unrepresented foreign corporation"—which "remains potentially difficult to locate"—and "a corporation with [an in-state] representative." *Id.* at 410. The Court thus equated a domestic corporation and a foreign corporation with a representative for service of process in the state, and drew a clear distinction between such corporations and a foreign corporation without a representative in the state. This line of demarcation is the logical implementation of the "domestication" concept at work in the earlier case law. Reading *Saunders* and *G.D. Searle* together, it is clear that the constitutionally defensible distinction is between "domesticated" and

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[23] The Court remanded the case for further review under the Commerce Clause, but before the federal district court could rule on remand, the New Jersey Supreme Court declared the statute unconstitutional under the Commerce Clause. *Coons v. American Honda Motor Co.*, 463 A.2d 921 (1983), *modified*, 476 A.2d 763 (N.J. 1984), *cert. denied*, 469 U.S. 1123 (1985).

"undomesticated" foreign corporations—not between all domestic corporations and all foreign corporations.

In other equal protection cases involving the taxation and regulation of out-of-state corporations, a parallel approach has evolved. Indeed, the domestication principle recognized in *Saunders* has been instrumental in equal protection analysis in these other contexts. The year before *Saunders*, the Court struck a statute that imposed a tax on the net local receipts of foreign corporations at a higher rate than for domestic corporations, explaining that:

> [A] line has to be drawn between the burden imposed by the State for the license or privilege to do business in the State, and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the State. With respect to the admission fee, so to speak, which the foreign corporation must pay, to become a *quasi* citizen of the State and entitled to equal privileges with citizens of the State, the measure of the burden is in the discretion of the State, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but, after its admission, the foreign corporation stands equal, and is to be classified with domestic corporations of the same kind.

Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 510-11 (1926); *see Southern Ry. v. Greene*, 216 U.S. 400, 418 (1910).

In *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), the Court invalidated another special tax on foreign corporations, citing *Hanover* and *Saunders* together for the proposition that "[a]fter a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own corporate progeny . . . ." *Id.* at 571-72. Likewise, in *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117

(1968), the Court struck down a state law granting a property tax exemption to domestic nonprofit corporations but denying the exemption to foreign nonprofit corporations, and repeated the above-quoted statement from *Wheeling*. *Id.* at 119-20.

Even when the Court upheld a California "retaliatory" tax statute (one that imposed an additional burden on foreign insurers whose states of incorporation imposed higher taxes on California insurers), it reviewed and reaffirmed the entire preceding line of cases, including *Saunders*. *See Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 662-68 (1981). And this Court applied this body of law in holding that a state law imposing a higher gross premiums tax rate on foreign insurance companies than on domestic insurance companies has a purpose violative of equal protection. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 883 (1985).

The foregoing cases have arisen in contexts where there is arguably more room for line-drawing than in judicial processes. Nonetheless, the Court has invalidated incremental taxes or regulatory burdens imposed on out-of-state corporations—either because the justification for disparate treatment was not substantial, or because a purpose to discriminate against non-residents could be identified. The Court's action has been fully appropriate: a non-resident is a prime example of someone whose interests should not be entrusted solely to the political processes and value judgments of a state legislature.[24]

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[24] *See* John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* 82-84 (1980). Indeed, the Court has found a lack of equal protection in state laws which effect disparate treatment as between long-time residents and relative newcomers, even though these newcomers have at least formal access to state legislatures. *See, e.g., Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898,

This case, of course, does not arise in a tax or regulatory context, but raises a fundamental question of fairness in a state judicial system. Recent equal protection decisions of this Court have emphasized that discrimination in the legal process itself is even more serious than the type of discrimination which may result from arbitrary line-drawing in substantive legislation. As this Court observed in another equal protection context just last Term:

> [T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds.[25]

The courts, state courts included, are expected to serve as the instruments of substantive justice and as the protectors of constitutional rights. Discrimination at the courthouse door opens up the possibility of myriad other forms of bias, perhaps subtler but no less real.

Thus, as recognized by the framers of the Equal Protection Clause, inequality in the judicial process—more than in any other branch of government—has a corrosive effect on the rule of law. *Saunders* is an integral part of

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911-12 (1986); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623-24 (1985); *Williams v. Vermont*, 472 U.S. 14, 23, 27 (1985); *Zobel v. Williams*, 457 U.S. 55, 64-65 (1982).

[25] *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087 (1991) (declaring unconstitutional on equal protection grounds racially discriminatory use of peremptory jury strikes in civil litigation). This Court also declared last Term that "[t]he Fourteenth Amendment's mandate that race discrimination be eliminated from all acts and proceedings of the State is *most compelling in the judicial system*." *Powers v. Ohio*, 111 S. Ct. 1364, 1373 (1991) (emphasis added) (race-based use of peremptory jury strikes in criminal case violates equal protection); *see also Rinaldi v. Yeager*, 384 U.S. 305, 309-10 (1966) (unconstitutional to require reimbursement for cost of trial transcript only from unsuccessful imprisoned defendants; all appellants are entitled to "open and equal access to the courts").

an enduring whole, and remains the controlling authority in this case.

II. THE MONTANA VENUE LAW'S DISCRIMINATION AGAINST FOREIGN CORPORATIONS IS NOT RATIONALLY RELATED TO A LEGITIMATE STATE PURPOSE

In the court below, no one proffered in support of the Montana law any rational basis grounded in a legitimate state policy objective. The Montana Supreme Court expressly avoided addressing whether the law has "a rational basis for treating all out-of-state corporations differently from all domestic corporations . . . ." Pet. App. 9a. Respondents, though relying on the FELA, have acknowledged:

> It is questionable whether or not MCA § 25-2-118 could pass constitutional muster for the manner in which it distinguishes between residents and non-residents in an ordinary transitory action.

Respondents' Brief in Opposition to Petition at 2. This is a candid admission but not an unwarranted one. The Montana venue rule that compels all foreign corporations to defend suits anywhere in the state has no rational basis.

A. There Is No Rational Basis In State Policy For The Discrimination By Montana Venue Law Against Foreign Corporations

The applicable Montana venue statute expresses no particular purpose and bears no meaningful legislative history. The statute was originally enacted in 1864, when Montana became a territory and before passage of the Fourteenth Amendment. *See* Statutory Appendix, *infra* at 1a (quoting original statute). There is no legislative history that reveals a purpose for the original version of the any-county rule of venue against non-residents.[26]

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[26] What is known about the Montana statute is simply that it was borrowed from California. *See Hardenburgh v. Hardenburgh*, 115

That rule was re-enacted several times in essentially the same form, and in 1985 it was recodified.[27] At no point during its history was any purpose for the distinctive treatment of foreign corporations identified.

In fact, the different treatment given to foreign corporations under the Montana venue statute does not appear to have resulted from any consideration of state policies, but from the absence of policy. The Montana Supreme Court could find no legislative guidance at all on the subject. That court therefore mechanically applied to the venue statute, which did not mention corporations, a nineteenth-century concept of foreign corporations that was not adapted to venue.

The Montana venue statute adopted in 1864 did not specifically address corporations, and may not even have been formulated with corporations in mind. At that time, Montana did not have a generic corporation statute or any general statute dealing with foreign corporations. The venue statute certainly did not prescribe any rule for determining the "residence" of a foreign corporation.

Mont. 469, 146 P.2d 151 (1944). The California provision had been adopted in 1851, *Burt v. Scarborough*, 366 P.2d 498, 500 (Cal. 1961), and allowed suit against non-residents in any county, but residents could only be sued in their place of residence. *See* Cal. Civ. Proc. Code § 395 (West 1973). The California statute has been interpreted to satisfy equal protection. After this Court's decision in *Saunders*, the California courts held that foreign corporations who registered to do business in California would have a residence in the state for venue purposes. *Hale v. Bohannon*, 241 P.2d 4 (Cal. 1952); *Bohn v. Better Biscuits, Inc.*, 78 P.2d 1177 (Cal. Ct. App. 1938).

[27] Without changing the substance, the 1985 revision rearranged the order of the venue statute, incorporated rules which had been "declared" by the Montana Supreme Court, and settled "ambiguities" inherent in the outdated language. *See* "Recommendations for Revisions in Venue Statutes Prepared by the Montana Supreme Court Commission on the Rules of Evidence," Exhibit 1 to the Montana State Senate Judiciary Committee Minutes of January 22, 1985.

The absence of any separate rule for foreign corporations is not surprising, for the states were just beginning to wrestle with the problem of how a corporation could be sued as a legal entity outside the jurisdiction in which it was chartered. The then-prevalent belief was that a corporation could exist only in the jurisdiction of its creation—that it could have no legal "life" elsewhere.[28] As Justice Frankfurter explained in *Neirbo v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939):

> The classic doctrine was that a corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty.' Logically applied, this theory of non-migration prevented suit in a non-chartering state, for the corporation could not be there. And such was the practice of the circuit courts until the opinion of Chief Justice Waite in *Ex parte Schollenberger* [96 U.S. 369, 377 (1878)], displaced metaphor with common sense.

Id. at 169 (citation omitted) (footnote omitted).

As far as can be determined, the Montana Supreme Court did not confront the problem of determining venue for a foreign corporation until its decision in *Pue v. Northern Pacific Ry.*, 78 Mont. 40, 252 P. 313 (1926). The foreign corporation in that case had, pursuant to Montana statute, designated its principal place of business in Montana and a person upon whom process could be served. However, the court ruled that the foreign cor-

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[28] *E.g., Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181 (1868) (absent recognition by other states, the corporation, "being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created"); *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1856) ("This corporation, existing only by virtue of a law of Indiana, cannot be deemed to pass personally beyond the limits of that State"); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839) ("a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created").

poration lacked a residence in the state and could therefore be sued in any county. The court referred to already outdated doctrine:

> At common law, a corporation could not migrate from the state of its creation and was incapable of being "found," for the purpose of service, in any other state and therefore its ability to be sued outside its native state depends entirely upon the written law of such other state . . . .

252 P. at 314-15. The Montana Supreme Court noted that, despite the legal recognition accorded to foreign corporations and the statutory steps taken to give them the legal attributes of domestic corporations, the legislature had made no specific provision with respect to their residence for purposes of venue:

> [E]ven though by statute a foreign corporation is deemed and taken to be a domestic corporation for the purposes of jurisdiction . . . , and subject to all the duties and liabilities, and is accorded all the privileges of a domestic corporation and may sue and be sued in the courts of this state . . . , unless it is given a domestic residence by some statutory provision, it remains a nonresident of the state and comes within the provision that such person may be sued in any county of the state.

Id. at 315 (statutory citations omitted). Lacking any statutory provision specifying a separate residence, the court felt compelled to apply the older concept of a corporation:

> As we have no provision taking foreign corporations out of the general rule above, it follows that the court in which the action was commenced acquired jurisdiction to try it, if proper service of summons was had.

Id.

The Montana court thus pointed to no state policy to justify this result, but merely concluded that it was

dictated by the failure of the legislature ever to enact a statute modifying the nineteenth century concept so as to give the foreign corporation an identifiable "residence" in the state. No Montana decision since *Pue* has sought to identify a rational basis for subjecting all foreign corporations to suits throughout the state. Accordingly, even at the time of its adoption, the Montana distinction between foreign and domestic corporations had no rational basis, but resulted from a mechanical throwback to an already discredited concept.

One year later, this Court decided *Saunders*. What was true in *Saunders* over sixty years ago is even truer in today's world of multistate corporations: "there is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or natural person." *Saunders*, 274 U.S. at 494. The Montana Code now imposes the same requirements of appointment and maintenance of a registered office and registered agent for service of process on foreign corporations as apply to domestic corporations. *Compare* MCA §§ 35-1-1012, 35-1-1013 *and* MCA §§ 35-1-305, 35-1-306 (1989). The institution of a suit against a domestic corporation in Montana is no different from the institution of a suit against a foreign corporation with a fixed place of business and a registered agent. Thus the disparate treatment of such foreign corporations in Montana venue law is a classic case of a law without any rational basis.

B. Federal Law Provides No Basis For The Discrimination Effected By The Montana Venue System

Not surprisingly, the Montana Supreme Court did not even hazard a "rational basis" in state policy for the statutory discrimination against out-of-state corporations. Instead, the court below concentrated on what it found to be the pro-plaintiff policy of the FELA, particularly with respect to the choice of forum. Pet. App. 9a. That

approach was entirely misdirected, for a number of reasons.

Most important, the FELA is not the subject of this case, and it is being raised only to mask the real issue. MCA § 25-2-118 is applicable to a whole range of civil cases, not only FELA cases. Prior decisions of the Montana Supreme Court have applied the statute to out-of-state corporate defendants in non-FELA actions.[29] The disparate treatment sanctioned by the Montana statute is not one of plaintiffs versus defendants, or employees versus railroads: it is of domestic corporations versus out-of-state corporations. Thus, under the Montana venue statute, a FELA suit against a railroad that is a domestic Montana corporation could be filed only in the railroad's county of residence (or in the county of the accident if in Montana), while an identical suit against BN could be brought in any county.[30] The district court below missed the point when it rejected the equal protection argument on the grounds that "[a]ll railroads *incorporated in other states* and doing business in Montana are treated similarly and can be sued in any county the plaintiff chooses." Pet. App. 17a, 24a (emphasis added).[31]

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[29] *See, e.g., Morgen & Oswood Constr. Co. v. United States Fidelity & Guar. Co.*, 167 Mont. 64, 535 P.2d 170 (1975); *Foley v. General Motors Corp.*, 159 Mont. 469, 499 P.2d 774 (1972).

[30] This is not a hypothetical example. There are several railroads incorporated in Montana: Central Montana Railway, Montana Rail Link, Rarus Railway, and Red River Valley & Western. The first three have their principal place of business in Montana, the last in North Dakota.

[31] This Court specifically rejected this form of sophistry in *Williams v. Vermont*, 472 U.S. at 27 ("A State cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated"), and in *Rinaldi v. Yeager*, 384 U.S. at 308 ("The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes.").

In any event, the FELA itself provides no support for discrimination in venue against out-of-state railroads. The FELA provides for broad, though not unlimited, venue in the federal courts: "in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. § 56 (1988). But that provision does not offer broader venue against some railroad defendants than others when actions are brought in federal court. Furthermore, the broad venue permitted with respect to FELA actions in the federal courts is consistent with the historical role of these courts in protecting the rights of foreign corporations. The federal courts have always been viewed as the refuge of out-of-state defendants. The U.S. Reports at the time of the FELA's enactment were filled with cases arising from attempts by states to deny foreign corporations access to federal courts.[32] Thus, it is not surprising that Congress gave FELA plaintiffs a broad choice of venue with respect to *federal* courts.

The FELA did not, however, prescribe such a rule for state courts. As this Court has observed in the closely analogous Jones Act context, "we should be slow to impute to Congress an intention, if it has the power, to interfere with the statutory provisions of the various states fixing the venue of their own courts." *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U.S. 278, 280-81 (1932). This Court has held that state court actions against FELA defendants must be governed by the same venue rules as all other actions in the state courts, not

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[32] *See, e.g., Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922); *Harrison v. St. Louis & S.F. R.R.*, 232 U.S. 318 (1914); *Herndon v. Chicago, R. I. & Pac. Ry.*, 218 U.S. 135 (1910); *Southern Ry. v. Allison*, 190 U.S. 326 (1903); *Barron v. Burnside*, 121 U.S. 186 (1887).

singled out for different treatment. *See Miles v. Illinois Cent. R.R.*, 315 U.S. 698, 703 (1942). Indeed, a state cannot discriminate between actions arising under a federal law, such as the FELA, and actions arising under state laws. *See Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950) (forum non conveniens); *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230, 234 (1934) (jurisdiction).[33] By providing for concurrent jurisdiction in the state courts, the FELA did not sanction arbitrary discrimination against out-of-state railroad defendants. Moreover, as this Court stated in *Saunders*: "It of course rests with the state to prescribe the venue of actions brought in her courts. But the exercise of this power, as of all others, must be in keeping with the limitations which the Constitution of the United States places on state action." 274 U.S. at 495.[34]

The Montana Supreme Court also concluded, as an adjunct to its main FELA argument, that the Montana venue statute is "nondiscriminatory in its operation" because the actions could have been brought in a federal district court sitting in Yellowstone County—that is, in the same locale in which the underlying cases were brought in state district court. Pet. App. 15a. But this assumes that the case would necessarily be tried in the

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[33] Although the issue is not presented in this case, the Montana rule that forum non conveniens is categorically unavailable in FELA cases, *see supra* at 4 n.5, violates the *Mayfield-McKnett* principle and equal protection.

[34] The legislative history of the FELA is of no more help to the Montana venue statute. The invocation by the court below of the "Jennings Bill" is empty. The Jennings bill was not "rejected" by either house of Congress: the House approved the bill, but the Senate never debated or voted on it. In these circumstances, no inference about "legislative intent" can be drawn. In addition, the quotation by the court below of Senator Borah refers to the *federal* court venue provisions of the statute, and is therefore irrelevant for the reasons given above. *See* 93 Cong. Rec. 4034, 4040 (Mar. 31, 1910).

federal district court in Billings. In fact, there is a reasonable possibility that cases such as the two below—in which the plaintiffs are Wyoming residents and the accidents occurred in Wyoming—would be transferred to the federal district court in Wyoming pursuant to 28 U.S.C. § 1404(a).[35]

Even if an action could have remained in the federal court in Billings, respondents' argument is still flawed in its unspoken premise that there is no substantial difference between federal and state court. The federal court system was designed to minimize the effects of local bias against out-of-state defendants, and contains specific safeguards in that respect. Unlike Montana state court judges, who are elected locally for a fixed six-year term of office, MCA § 3-5-203, federal judges are appointed for life by the President subject to the advice and consent of the Senate. The jury in federal court is also reflective of a wider geographic region. In the Yellowstone County state trial court, the jury venire is limited to Yellowstone County itself. In contrast, the jury venire for the Billings Division of the United States District Court for the District of Montana is drawn from Yellowstone and twenty-six other nearby counties. D. Mont. R. 105-1 (1991). In addition, a defendant in federal court has the right of appeal to the United States Court of Appeals for the Ninth Circuit, rather than to the Montana Supreme Court (whose

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[35] Under 28 U.S.C. § 1404(a) (1988), a district court may transfer venue to any district where the action may have been brought for the convenience of the parties and the witnesses in the interest of justice. Federal courts in the district of Montana have granted motions to transfer under § 1404(a) to districts outside Montana in many instances. Among the factors considered in granting these motions were which forum had a greater connection to the lawsuit, the location of the defendants, witnesses and evidence, and public interest concerns such as court congestion. *See, e.g., Equitable Life Ins. Co. of Iowa v. Pfeffer*, CV 89-203-BLG-JFB, 4 Mont. Fed. Rpts. 172 (1989); *Friez v. Pogatchnik*, CV 89-28-BLG-JFB, 3 Mont. Fed. Rpts. 250 (1989).

justices are also elected). Thus, the coincidence of concurrent federal jurisdiction does not diminish the prejudice experienced by BN as an out-of-state corporation defending itself within the Montana state judicial system.

In sum, no meaningful rationale has been supplied for the blatant discrimination against out-of-state corporations in the Montana venue system. This resounding silence provides ample confirmation that the statute represents nothing more than arbitrary and indefensible localism.

III. THE MONTANA VENUE SYSTEM EFFECTS REAL AND SUBSTANTIAL DISCRIMINATION AGAINST FOREIGN CORPORATIONS

The Montana Supreme Court plainly viewed venue as a relatively insignificant matter, unworthy of constitutional protection. This is a dangerous misconception. In fact, selection of the forum of a case can have a great effect on its outcome. The dynamics of forum shopping and venue selection are obvious:

> [A]ny lawyer [knows] that the intangibles of personnel and procedure [can] tip the balance in many a case. . . . American lawyers have long known how to take a defendant with statewide operations to the right county and city; thus do rural complaints against Illinois railroads get filed in Chicago to avoid the stingy juries often found downstate.

Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit*, 82-83 (1991). The most elemental trial practice guides emphasize the importance of careful forum selection: "Experienced attorneys are well aware of the practical significance of the place of trial. . . . Juries in some areas develop reputations for being 'plaintiff minded,' or 'defendant-minded.'" [36] Or, as one authority puts it:

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[36] 3 Am. Jur. *Trials* § 22, at 707-08 (1965); *see also, e.g.*, R. Casad, *Jurisdiction and Forum Selection* § 2:12, at 15 (Callaghan

"The decision [where to sue]—which can affect such factors as the evidence that may be admitted, the length of delay until trial, the cost of the litigation, and the amount of judicial tolerance that will be exercised—may decide the outcome of the case." BNA, *Civil Trial Manual Practice Series* 21:241, at 11-12 (1987).

Indeed, the very existence of venue statutes, their detail, and the balancing of values inherent in them, all proclaim the importance of venue. The Montana Supreme Court itself has emphasized in another context that "'[t]he right of a defendant to have an action brought against him . . . in the county in which he has his residence is an ancient and valuable right, which has always been safeguarded by statute and is supported by a long line of judicial decisions.'" *Hardenburgh v. Hardenburgh*, 115 Mont. 469, 146 P.2d 151, 153 (1944) (quoting *Brown v. Happy Valley Fruit Growers*, 274 P. 977, 979 (Cal. 1929)). Montana law further recogizes this fact by permitting interlocutory appeals, as in the underlying cases here, of denials of motions for change of venue.

The very fact that venue is often hotly contested proves that those who know best—trial lawyers and trial judges—treat it as a crucial matter. Moreover, in a case involving federal court venue, this Court has observed that "[i]n most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great West. United Corp.*, 443 U.S. 173, 183-84 (1979) (footnote omitted). Thus, discrimination among various classes of defendants with respect

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1988): "In cases that may be tried to a jury, it will be important to know something about the demographic characteristics of the population from which the jurors are likely to be drawn. Trial lawyers have their own ideas about the professional, social, economic and ethnic factors they like to see represented on a jury panel. Persons with the desired qualifications are more likely to be found in some locales than others."

to venue is discrimination in one of the fundamentals of civil litigation.

A. The Equal Protection Clause Forbids Real And Substantial Discrimination In State Court Venue

The effort of the court below to minimize the importance of venue appears to have been prompted by its reading of *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976). In that case, this Court distinguished *Saunders* and upheld a state venue law against an equal protection challenge.

On its face, the Texas statute in *Starnes* provided that out-of-state corporations could be sued in any county in the state in which they had an agent. Domestic corporations could be sued outside their county of residence only if they had an agent in that county *and* if the plaintiff could make a preliminary showing as to his or her cause of action. *Id.* at 638. In *Starnes*, an out-of-state corporate defendant complained of a lack of equal protection, on the theory that it was denied an early discovery tool that was available to domestic corporations:

> The gist of appellant's argument is that, because Exception 27 does not require that plaintiff demonstrate the existence of his cause of action, there was '[d]enied to appellant . . . a virtually unique opportunity afforded to domestic corporations, to preview its adversary's case in chief (except as to the extent of damages); to cross-examine plaintiff's witnesses as to the nature and existence of the alleged cause of action; to obtain from the Court a venue ruling which would, under the circumstances, be tantamount to a judicial assessment of plaintiff's cause of action; to nip a frivolous or baseless claim "in the bud," before it could escalate into a lengthy, complex and time-consuming lawsuit; and finally, to obtain, by demanding a jury trial of the venue facts, either an early trial on the merits or at least a preliminary assessment by a jury of the plaintiff's credibility.'

Id. at 642-43 (citation to brief omitted).

The constitutional claim in *Starnes* was limited to the alleged inequality in this proto-discovery feature of the statute. Petitioner there had not objected to, and the Court did not address, the aspect of the venue statute authorizing "broader venue geographically for suits against foreign corporations than for suits against domestic corporations." *Id.* at 645-46. Thus, the discriminatory effect presented in this case—the potential for rampant forum shopping that results from an any-county venue rule against certain defendants—was decidedly not at issue in *Starnes*.

In any event, the actual implementation of the statute by the Texas courts kept the statutory discrimination from becoming real and substantial. As was revealed during oral argument, the showing actually required of plaintiffs in cases against domestic corporations was merely a *prima facie* matter, quite easily satisfied in practice. *Id.* at 643. This meant in turn that there was little incremental discovery afforded to domestic corporate defendants in the process, and that the overall effect of the difference was negligible in light of the many and far more extensive discovery tools equally available to all litigants. *Id.* at 644. In this sense, *Starnes* was not even about quantitative or qualitative equality in discovery—it was only about parity in the timing of discovery.

Thus, the alleged discrimination which had brought the case before this Court evaporated during oral argument. Based on this eleventh-hour factual development, the Court observed that "[j]ust as a statute nondiscriminatory on its face may be grossly discriminatory in its operation, . . . so may a statute discriminatory on its face be nondiscriminatory in its operation." *Id.* at 645 (citations omitted). The *Starnes* Court ultimately held that the case presented no significant discrimination against out-of-state corporations, and thus no equal protection violation. *Id.* at 643-45.

The outcome of *Starnes* is fully consistent with the holding in *Saunders*. *Starnes* stands only for the unre-

markable proposition that when apparent discrimination is eliminated by the state's actual implementation of a law, there is no violation of equal protection. In the context of venue statutes and their disparate potential for forum shopping, the true analogy to *Starnes* is a state law that distinguishes between residents and non-residents in the manner of the Montana statute, but also permits an out-of-state corporation to establish an in-state residence for purposes of venue. *See* cases cited *supra*, at 15 n.18. Such an interpretation was urged but rejected below. Pet. App. 5a-6a.

As a result, the discrimination effected by the Montana venue statute is very real, and cannot be avoided or mitigated by an out-of-state corporate defendant. Given the obvious logistical, tactical, and strategic disadvantages imposed by this type of double standard, the conclusion of the Court in *Saunders* is plainly applicable here.[37]

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[37] The decision below attached substantial weight to a footnote in Justice Brennan's opinion for the Court in *Starnes*, questioning the continuing vitality of *Saunders*. *Id.* at 645 n.6 (dicta). But that footnote certainly did not purport to overrule *Saunders*, and since then this Court has cited *Saunders* as authority in an equal protection case, confirming that it remains good law. *See Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. at 664-65.

Nor did any of the cited cases attempt to overrule *Saunders*. In *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), the Court considered a statute that favored *non-residents* over residents and therefore did not raise the constitutional concern that local interests were using the state legislature to discriminate against out-of-state corporations. In *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580 (1935), the Court, far from discrediting *Saunders*, relied upon that decision as establishing the test for determining the constitutional validity of legislative discrimination. *Id.* at 583. Moreover, the statute at issue in *Brownell* was upheld because the foreign corporation failed to demonstrate it was similarly situated to a domestic corporation; only domestic corporations were required to maintain a guaranty fund with the state commissioner of insurance. *Id.* at 585. *Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1931), involved another situation, like *Snell*, in which a distinction in venue between individuals and corporations was held permissible.

B. The Montana Venue System Creates Real And Substantial Litigation Disadvantages For Out-of-State Corporations

Everything about the Montana venue statute—its divided structure, its plain language, and its interpretation in case law—discriminates between domestic and foreign corporations. Under MCA § 25-2-118, domestic corporations enjoy the privilege of being sued only in their county of selected residence or where the accident occurred. In contrast, any foreign corporation may be sued in any county selected by the plaintiff. In the give and take of civil litigation, this inequality has tremendous impact.

This double standard has the obvious effect, exactly as observed in *Saunders*, of imposing additional logistical burdens on out-of-state corporations in their Montana state court litigation. If the plaintiff may choose any county in Montana in which to litigate, then he or she gains tremendous tactical advantage over the defendant. In effect, defendant's witnesses—who will often include supervisors and corporate officers—can be held hostage at and around the time of the trial. This translates into increased settlement leverage and a substantial impact on the probable financial outcome of the case.

Foreign corporations are also affected in an even more dramatic way. They are subjected to open-ended forum shopping, whereas domestic corporations are protected from this phenomenon. The quantitative impact of this disparity is heightened by the "open door" policy maintained by Montana. *See supra*, at 4 & n.4 Under the Montana judicial system, an out-of-state corporation may be hauled into court in any Montana county, by an out-of-state plaintiff, represented by out-of-state lawyers, to respond to allegations of an out-of-state injury.

In fact, this is precisely what is happening to BN in Montana. As shown by the cases listed in Pet. App. 40a-44a, plaintiffs are going out of their way to bring

suit against BN in two selected Montana counties. In effect, the Yellowstone and Cascade County courts and their juries have become powerful magnets for FELA claims, drawing cases not only from all of Montana but from across the entire upper northwest region of the United States.

From all of the circumstances, it is manifest that BN is being subjected to a virulent form of forum shopping —one from which Montana's domestic corporations are immunized by state law. The effect of the Montana venue system is a blatant discrimination. In litigation such as the underlying cases here, the Montana corporation takes the defense with the guarantee of a "home field" advantage, in the county which it has selected as its residence. In contrast, the out-of-state corporation is compelled to defend itself in a court which has been selected by the plaintiff—after a wide-ranging exercise in forum shopping—as the one in which the largest jury verdict is likely to be obtained.

When plaintiffs' counsel are permitted to canvass an entire state in order to find a pro-plaintiff haven, there need be only one or two such courts out of dozens in the system in order for plaintiffs to secure a major litigating advantage. A disproportionate number of cases will be funneled into just those courts. In addition, the disadvantage of mounting a defense in a jury trial in such a forum is the greatest for an out-of-state corporate defendant, precisely the category singled out by the Montana venue law. Thus, the operation of this double standard for this selected category of litigants has a compound effect.

As this case perfectly demonstrates, litigants are skillfully exploiting the discriminatory provisions of the Montana venue law. Plaintiffs who take out-of-state corporations to court in Montana can take free advantage of idiosyncracies in the bench and jury venire in selected county courts, to the obvious disadvantage of these muti-

state businesses incorporated elsewhere. In Montana and other states with venue laws that discriminate against out-of-state corporations, the result can only be to exacerbate the exploding volume and cost of civil litigation. By any practical definition, the discriminatory effects of the Montana statute are both "real and substantial."

Furthermore, the operation of the forum shopping permitted by the Montana venue statute is closely related to the political dynamics of the equal protection violation. Few state legislators would be inclined to subject *all* defendants, including their own constituents, to unlimited forum shopping across the state. Local businesses would vehemently oppose such treatment and would surely vent their views on the state bench, bar, and legislature. Thus, laws permitting rampant forum shopping become far more viable from a political standpoint when local businesses are insulated from their effects. Lacking any legitimate purpose, Montana's open-ended venue rule is able to remain on the books only because it targets outsiders for disadvantageous treatment.

CONCLUSION

For these reasons, the Court should reverse the decision and order of the Supreme Court of the State of Montana.

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STATUTORY APPENDIX

The predecessor of current section 25-2-118 was first enacted at Bannack in 1864, the same year the Organic Act was passed establishing Montana as a territory. That section read as follows:

> Sec. 20. In all other cases, the action shall be tried in the county in which the parties, or some of them, resided at the commencement of the action; or, if none of the parties reside in the Territory, the same may be tried in any county which the plaintiff may designate in his complaint, subject, however, to the power of the court to change the place of trial as provided in this act.

Acts, Resolutions and Memorials of the Territory of Montana, Title II § 20 (1864).

After intervening minor revisions and recodifications, the statute is now codified as follows:

> Residence of defendant. Unless otherwise specified in this part:
>
> > (1) except as provided in subsection (3), the proper place of trial for all civil actions is the county in which the defendants or any of them may reside at the commencement of the action;
> >
> > (2) if none of the defendants reside in the state, the proper place of trial is any county the plaintiff designates in the complaint;
> >
> > (3) the proper place of trial of an action brought pursuant to Title 40, chapter 4, is the county in which the petitioner has resided during the 90 days preceding the commencement of the action.

MCA § 25-2-118.

(10)

No. 90-970

FILED
APR 8 1991
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

WILLIAM D. FORD and THOMAS L. JOHNSON,
Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Montana

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a state venue statute violates the equal protection clause of the Fourteenth Amendment because it requires that residents, including domestic corporations, be sued in their county of residence, while nonresidents, including foreign corporations, may be sued in any county.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-779

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

WILLIAM D. FORD and THOMAS L. JOHNSON,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Montana

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BRIEF FOR RESPONDENTS

STATEMENT

Petitioner, the Burlington Northern Railroad ("BN"), challenges Montana's residence-based venue statute on the ground that it denies equal protection to foreign corporations. The trial courts in both of these consolidated cases rejected the claim and, on interlocutory appeal, the Montana Supreme Court affirmed.

1. *The Montana Venue Statute.*—The statute at issue in this case provides that "the proper place of trial for all civil actions is the county in which the defendants or any of them may reside . . . [and] if none of the defendants reside in the state, the proper place of trial is in any county the plaintiff designates . . . ." Mont. Code

Ann. ("MCA") §§ 25-2-118(1), (2) (1991). This provision traces its origins to Montana's days as a territory. *See* Acts, Resolutions and Memorials of the Territory of Montana, Title II § 20 (1864) (reprinted in the statutory appendix to petitioner's brief). The current version was enacted in 1985 as part of a comprehensive recodification of the venue laws, which had been recommended by the Montana Supreme Court's Commission on the Rules of Evidence. *See* MCA § 25-2-101 *et seq.* (1991) (including commentary by Supreme Court Commission).[1]

Montana law further provides that domestic corporations qualify as residents for purposes of applying this venue statute. Such a corporation is deemed to reside in "the county in which it has its principal place of business." *Platt v. Sears, Roebuck & Co.*, 721 P.2d 336, 338 (Mont. 1986). This principal place of business, in turn, is "easily identifiable" (*Mapston v. Joint School Dist. No. 8*, 740 P.2d 676, 677 (Mont. 1987)), because each corporation must file an annual report with the Secretary of State indicating where its executive officers are located. *See* MCA § 35-1-1101 (1991), *amended by* § 35-1-1104 (effective Jan. 1, 1992).

Foreign corporations doing business in Montana are considered to be nonresidents within the terms of the venue statute. When the question first arose in 1926, the Montana Supreme Court ruled that "unless [a foreign corporation] is given a domestic residence by some statutory provision, it remains a nonresident of the state and comes within the provision that such person may be sued in any county of the state." *Pue v. Northern Pac. Ry.*, 252 P. 313, 315 (Mont. 1926) (citations omitted). Since then,

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[1] The Commission recommended and the legislature adopted the continuation and modification of several additional venue provisions for specific kinds of actions—*e.g.*, a plaintiff may file a tort suit in "the county where the tort was committed" (MCA § 25-2-122(2) (1991)), regardless of where the defendant resides. *See generally* MCA §§ 25-2-121 through 25-2-126 (1991).

the court has reaffirmed this principle on numerous occasions. *See, e.g., Foley v. General Motors Corp.*, 499 P.2d 774 (Mont. 1972). The Montana Supreme Court Commission that proposed the current venue statute likewise relied on this principle, emphasizing that "by definition, a nonresident of the state is not resident in *any* county." MCA § 25-2-118 commentary (Annotations 1990).[2]

2. *The Present Case.*—This case began as two separate actions under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.* Both were filed in state district court in Billings, which is in Yellowstone County, Montana. Each plaintiff is a BN employee who lives, works, and was injured in Sheridan, Wyoming, a small town located about 100 miles from Billings.[3] BN is incorporated in Delaware and has its principal place of business in Fort Worth, Texas. Pet. App. 4a. In Montana, BN has extensive trackage and substantial numbers of personnel in various counties, including Yellowstone. J.A. 20-21.[4] BN nevertheless challenged venue in Billings, insisting that it could only be sued in Hill County, where its Montana Division—one of several BN Divisions operating in the State—is headquartered. The sole basis for BN's motion was that, under this Court's decision in

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[2] In *McAlear v. Kasak*, 731 P.2d 908 (Mont. 1987), the Montana Supreme Court held that, in a tort action, a defendant—either resident or nonresident—could be sued only in the county where the tort had been committed. That decision was quickly overruled in *Haug v. Burlington N. R.R.*, 770 P.2d 517 (Mont. 1989), which again made clear that "if none of the defendants reside in Montana, a plaintiff may choose any county in the state as the place of trial of a tort action." *Id.* at 520.

[3] Sheridan has a population of about 14,000. Billings, the nearest "big" city, has a metropolitan area of approximately 115,000 people. Both respondents received medical treatment in Billings for the injuries that led to this litigation.

[4] BN also maintains a registered agent to receive service of process in Helena, the State capital, which is located in Lewis & Clark County, Montana.

Power Mfg. Co. v. Saunders, 274 U.S. 490 (1927), Montana's distinction with respect to venue for domestic and foreign corporations violates the equal protection clause. Both trial judges rejected this claim.

The Montana Supreme Court consolidated the cases on appeal and affirmed, concluding that its "decision appears to be controlled by a series of U.S. Supreme Court decisions, beginning with *Cincinnati Street Ry. Co. v. Snell* (1904), 193 U.S. 30." Pet. App. 6a. In particular, relying on the analysis in the most recent of these cases, *American Motorists Inc. v. Starnes*, 425 U.S. 637 (1976), the Montana court held that "the statute which is challenged by defendant is nondiscriminatory in its operation." Pet. App. 15a. The court stressed that the present case differs from *Saunders*, because there the "defendant did no business in the county where venue was established. In this case, [BN] admittedly does business in Yellowstone County." *Id.* 9a.[5] This distinction was especially important, the court explained, because the claims at issue here were based on FELA—a statute that provides extremely broad venue in the federal courts, reflecting a national "policy of allowing railroad workers to sue their employer at any location where the employer does business." *Id.* 11a. Consequently, "[t]he practical effect of [Montana's] venue statute in this case is that defendant is required to defend itself in Yellowstone County, Montana—a location where it could admittedly be required to appear and defend itself against the same claim, had plaintiffs chosen to sue it in federal district court." *Id.* 15a. In these circumstances, the court ruled, the specific discrimination alleged by BN was too insubstantial to merit constitutional protection.

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[5] The Montana court also observed that "subsequent decisions by the U.S. Supreme Court raise a question about whether *Saunders* continues to be good law." Pet. App. 11a; *see also id.* 12a-14a (discussing post-*Saunders* cases).

SUMMARY OF ARGUMENT

The residence-based distinction that Montana's venue statute draws between domestic and foreign corporations does not violate the equal protection clause. The legal standard for making that determination is whether "the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983). In this case, the disputed classification reasonably serves the legitimate "convenience" concerns of corporate residents by insisting that they be sued where they are headquartered—the place where their responsible executive officials, corporate records, and legal counsel are normally located. By contrast, foreign corporations, precisely because they have their principal place of business outside the state, do not usually present the kind of convenience-based justifications that support residential venue. As a result, such corporations frequently are amenable to suit in a different array of locations. *See, e.g., Brunette Machine Works Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706 (1972) (federal venue statute requires that domestic corporations be sued where they reside whereas foreign corporations may be sued in any federal court nationwide).

Petitioner does not challenge Montana's general distinction between domestic and foreign corporations but, rather, argues only that *some* foreign corporations are constitutionally entitled to be treated as if they were residents of the State. That position, however, rests on a fundamental misunderstanding of the nature of rational basis scrutiny under the equal protection clause. The legislature simply need not tailor statutory classifications with mathematical precision, eliminating every possible instance of under- or over-inclusion. *See, e.g., Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). On the contrary, inherent in the nature of the legislative function is the recognition that "[g]eneral rules are essen-

tial . . . even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Califano v. Jobst*, 434 U.S. 47, 53 (1977). Nothing in *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927), on which petitioner places primary reliance, detracts from this basic point. The venue provision in that case was not limited to a single residence, but allowed domestic corporations to be sued in any county where they had an office. Given *that* starting point, it is not nearly so easy to identify a rational basis for permitting a foreign corporation to be sued statewide, rather than in the counties where *it* had offices. Nor is the constitutionality of Montana's venue statute undermined by petitioner's complaints about "forum shopping"—an attack that, in this case, turns out to be as factually insupportable as it is legally irrelevant.

ARGUMENT

THE MONTANA VENUE STATUTE DISTINGUISHING BETWEEN DOMESTIC AND FOREIGN CORPORATIONS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The distinction that Montana draws with respect to venue for resident and nonresident defendants does not violate the equal protection clause because it is rationally related to a legitimate state interest. That state interest is to promote the convenience of residents by allowing them to be sued where they live, where their books and records are generally kept, and where their attorneys are likely to be found. The statutory classification drawn to further this legitimate state interest is reasonably tailored. Residents as a group, including domestic corporations, are likely to be convenienced in fact by a venue rule allowing them to be sued where they are located. Nonresidents, including foreign corporations, on the other hand, normally will not derive similar benefits from being sued at a particular location in the state. The equal protection clause allows Montana to employ these reasonable categorical distinctions and does not require it to redraft

its venue statute so that each foreign corporation would be allowed to show, on a case-by-case basis, that it has obtained a *de facto* residence within the State.

1. A venue provision like the one at issue in this case must be "tested under the lenient standard of rationality that this Court has traditionally applied in considering equal protection challenges to regulation of economic and commercial matters." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96 (1983) (citing cases).[6] Under that standard, "a statute will be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose." *Ibid.*; *see also Pennell v. City of San Jose*, 108 S. Ct. 849, 859 (1988) (the Court "'will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational'") (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)) (brackets in original).

The application of these general principles requires the Court to answer only "two questions: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?" *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981) (citing cases).

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[6] There is no question that the rational basis prong of equal protection analysis applies to this case. *See, e.g.*, Pet. Br. 7 ("the Montana venue system . . . bears no rational basis related to a legitimate state purpose"). Indeed, this Court has held that this standard applies to substantially more burdensome forms of discrimination against foreign corporations. *See, e.g., Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981) (rational basis test applies when state imposes "more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations").

In this case, each of those questions warrants an affirmative response.[7]

a. Petitioner does not dispute, nor could it, that Montana's residence-based venue provision serves a "legitimate state purpose." Virtually every State and the federal government has always had venue statutes designed to distribute litigation based on considerations "relat[ing] to the convenience of litigants." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). *See generally* 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3803 (1986). Although different states use one or more of several customary criteria, "[t]he most common provision today, and the basic one, appears to be venue based upon the residence of the defendant." Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 Mich. L. Rev. 307, 315 (1951); *see also id.* at 315 n.33 (citing Appendix referencing statutes in 47 states that employed this criterion). Similarly, the cornerstone of federal venue statutes for more than a

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[7] To satisfy the rational basis test, a state need not set forth its rationale in legislative history or through judicial opinion. *See, e.g., United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (when "there are plausible reasons for [the legislature's] actions, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether the reasoning in fact underlay the legislative decision' ") (internal citation omitted); *McGinnis v. Royster*, 410 U.S. 263, 277 (1973) ("we . . . refuse to discard a clear and legitimate purpose because the court below perceived another to be primary"); *Kadrmas v. Dickinson Pub. Schools*, 108 S. Ct. 2481, 2489-90 (1988) ("we are not bound by explanations of the statute's rationality that may be offered by the litigants or other courts"). Accordingly, petitioner's reliance on the alleged absence of any clear expression of the State's rationale for its venue statute (Br. 23-27) is beside the point. It also happens to be incorrect: the legislative history of the current version of the statute, including the Supreme Court Commission's report setting forth the basis for the distinction, provides a contemporaneous statement of legislative purpose. *See* MCA § 25-2-118 commentary (Annotations 1990). *See also infra* note 19 (discussing the Montana Supreme Court's specific case-related considerations for rejecting petitioner's claim).

century has been the defendant's residence. *See, e.g., Brunette Machine Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706 (1972). The justification for this particular venue rule is self-evident: it tends to minimize the cost and inconvenience of litigation to the party that is being sued.

b. The distinction that Montana draws between domestic and foreign corporations is rationally related to the legitimate state interest promoted by a residence-based venue statute. As a general matter, it seems hard to dispute that a corporate defendant is likely to be convenienced by being sued, as in Montana, where it has its principal place of business: that is where the officials who have the ultimate responsibility and authority for directing the corporation's defense are located; it is where the corporation's records, including relevant insurance policies and other important documents, are usually kept; and it is where the corporation's chief legal counsel is likely to reside.

On the other hand, these kinds of convenience considerations are usually inapplicable to foreign corporations. Thus, many such corporations, even when subject to suit in a state, are not present there (*see, e.g., Quill Corp. v. North Dakota*, No. 91-194 (U.S. Sup. Ct., pending)) or, if they are present, it is only through the use of transient personnel. And even for a corporation like petitioner, which maintains offices in the State but has its principal place of business elsewhere, the factors that justify residential venue are unlikely to be present. As Justice Holmes long ago explained, "[a] foreign corporation merely doing business in the State and having its works elsewhere is more or less inconvenienced by being sued anywhere away from its headquarters." *Saunders*, 274 U.S. at 498 (dissenting opinion).[8]

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[8] Moreover, to the extent that a foreign corporation is actually inconvenienced in a given case, Montana allows it to seek a transfer of venue under the doctrine of *forum non conveniens*. MCA § 25-

The rationality of Montana's venue statute is supported not only by reasoned analysis but also by history and current practice. Thus, federal law establishes exactly the same distinction—providing venue for U.S. citizens (including corporations) in a "judicial district where any defendant resides, if all defendants reside in the same State," 28 U.S.C. §§ 1391(a), (b), whereas "*an alien may be sued in any district*," *id.* § 1391(d) (emphasis added). This distinction, as this Court observed, traces "its roots . . . back to the beginning of the Republic." *Brunette Machine Works*, 406 U.S. at 708. It applies to foreign corporations as well as individuals and rests on the view that "the general venue provisions were framed with reference to the defendant's place of residence or citizenship, and an alien defendant is by definition a citizen of no district." *Id.* at 709 (footnote omitted) (relying on *In re Hohorst*, 150 U.S. 653 (1893)).[9] By the same token, while petitioner now at-

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2-201(3) (1991) (transfer "when the convenience of witnesses and the ends of justice would be promoted"). While petitioner correctly notes that the Montana Supreme Court has ruled that such transfers are unavailable in FELA cases (*see Haug v. Burlington N. R.R.*, 770 P.2d 517, 521-22 (Mont. 1989)), that fact has no bearing here. As petitioner repeatedly emphasizes, its challenge is to the Montana venue statute as it applies to foreign corporations in all cases and not to its particular application in FELA actions. *See, e.g.*, Br. 28 ("FELA is not the subject of this case"). Indeed, petitioner has never suggested that the *forum non conveniens* doctrine would support a transfer to Hill County, which is the only venue petitioner has sought here. In any event, the Montana Supreme Court's special rule in FELA cases—applicable to domestic and foreign railroads alike—legitimately reinforces Congress's "policy favoring the injured railroad worker's choice of forum." *Labella v. Burlington N., Inc.*, 595 P.2d 1184, 1187 (Mont. 1979). That court has also repeatedly indicated that "if a substantial increase of this type of litigation is called to our attention in the future we will reexamine the situation." *Ibid.* As we discuss below, no such increase in FELA cases has been experienced in Montana. *See infra* note 18.

[9] Aliens are, however, "persons" protected by the equal protection component of the Fifth Amendment's due process clause. *See, e.g.*,

tempts to suggest otherwise (Br. 15-16), in its petition BN correctly recognized that a "number of states" have venue provisions like Montana's. Pet. 23; *see id.* at 22-23 & nn. 32-35 (citing cases).

In summary, it is simply not plausible to argue that Montana's distinction between venue for domestic and foreign corporations lacks a rational basis. In our view, Justice Holmes was plainly correct when he stated that the convenience factors affecting venue determinations indicate that "the difference to [a foreign corporation] between one county and another is likely to be less than it will be to a corporation having its headquarters in the State." *Saunders*, 274 U.S. at 681 (dissenting opinion). But even if this Court were to have any doubt about that conclusion, there would still be no basis for holding that Montana is being "arbitrary" or "irrational" in following it. *See, e.g., Western & Southern Life Ins. Co.*, 451 U.S. at 674 ("[p]arties challenging legislation under the Equal Protection Clause cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable' ") (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)) (brackets in original). Petitioner's claim must therefore be rejected.

2. Petitioner does not acknowledge, much less dispute, these fundamental principles of equal protection analysis or their application to Montana's venue statute. Instead, it attempts to sidestep their force, arguing not that the general distinction between domestic and foreign corporations is impermissible, but only that *some* foreign corporations are entitled to be treated as residents for venue purposes. In support of this conclusion, petitioner relies almost exclusively on a single precedent, *Power Mfg. Co.*

United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1064 (1990) (citing cases). Consequently, petitioner's challenge here would appear to implicate the validity of the federal venue statute as well.

v. Saunders, 274 U.S. 490, which it attempts to bolster with a generalized claim that "forum shopping" has become a serious problem under Montana's venue provision. This argument is both flawed in concept and lacking in support.

a. Apparently recognizing that Montana's venue distinction between domestic and foreign corporations is obviously legitimate in many circumstances, petitioner inconspicuously attempts to carve out a more limited position—one that premises the statute's invalidity on a comparison between a domestic corporation and "an out-of-state corporate defendant *with a fixed place of business and a registered agent* [in Montana]." Br. 7, 9 (emphasis added). The short answer to this claim, however, is that the rational basis test does not require the states to craft their statutes with the degree of exactness that petitioner is demanding. On the contrary, a "statutory classification . . . need not be drawn so as to fit with precision the legitimate purpose animating it. That [a State] might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976) (citations omitted). Indeed, as this Court has recognized, "[g]eneral rules are essential [if particular areas are] to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Califano v. Jobst*, 434 U.S. 47, 53 (1977).

The application of these settled principles in the present case demonstrates just how far petitioner has wandered from the rational basis standard on which it purports to rely. As a preliminary matter, petitioner makes no effort to tie its attack on Montana's venue statute to the legitimate convenience concerns that the statute is properly designed to serve. Thus, neither in general nor with respect to this case in particular does petitioner claim that

the presence of "a fixed place of business and a registered agent [in Montana]" (Br. 7, 9), would make litigation against a foreign corporation more convenient in any single county. In fact, such a claim seems untenable on its face: in many instances, including this case, a foreign corporation's registered agent (often a law firm) will not even be in the same county as that of its fixed place of business; and to complicate matters further, such a corporation will often have fixed places of business in several counties throughout the State. There is no reason to think that any of these several locations would be a uniquely convenient place for a foreign corporation to defend a lawsuit. In short, by uncoupling the legislative classification from its intended purpose, petitioner is essentially making a meaningless comparison for equal protection purposes.

More fundamentally, even if petitioner could show that considerations of convenience would support treating certain corporations as *de facto* residents, its argument would still be unavailing. Montana has drawn a statutory classification that, among other things, has the virtue of being readily administrable. Thus, to our knowledge, in the State's entire history there has never been a case raising a question about the appropriate residential venue for a domestic corporation. As the Montana Supreme Court has observed, a domestic corporation's residence is "easily identifiable." *Mapston v. Joint School Dist. No. 8*, 740 P.2d 676, 677 (Mont. 1987). The adoption of petitioner's approach, by contrast, would inevitably lead to case-by-case factual disputes over the quintessentially artificial question of where a foreign corporation that has its real principal place of business *outside Montana* may properly be said to have its principal place of business within the State.[10] Take, for example, a foreign corporation that

[10] It seems obvious that a foreign corporation cannot simply be allowed to make its own choice of an in-state "principal place of business." As one court has aptly observed, such a corporation "may designate as its principal office a county remote from the population centers of the state, in which it conducts little or no business since

owns three drug stores in different counties in Montana: there is no principled way to establish that corporation's single "residence" for venue purposes. In a similar vein, the location of petitioner's "residence" in Montana will also be a sharply contested issue because BN does business and maintains offices throughout the State.[11] Given these realities, Montana has a strong interest in avoiding the depletion of its limited judicial resources by having to resolve such collateral, front-end factual disputes about venue. To respect just that kind of interest—*i.e.*, to prevent the inevitable imprecision of legislative classifications from being routinely displaced by the rigors of the judicial factfinding process—the rational basis test is expressly designed to tolerate a considerable amount of statutory under-inclusion, over-inclusion, or both. That permissible amount has not been exceeded here.

b. Petitioner's heavy reliance on this Court's decision in *Power Mfg. Co. v. Saunders* is likewise misplaced, both

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its principal office, in fact, ordinarily will be maintained in the state of incorporation. A domestic corporation would be likely to find such a procedure uneconomical. Competitive factors probably would dictate that its principal office be located where it intends to conduct its business." *Commercial Ins. Co. v. Adams*, 366 S.W.2d 801, 808 (Tex. Ct. App. 1963).

[11] BN claims that its principal place of business in Montana is in Havre, Hill County, because that is where the headquarters for its Montana Division is located. But, as discovery in this case already shows, BN also has trackage from its Dakota and Denver Divisions in Montana and has offices and substantial personnel in Yellowstone County, where the present cases were filed. In fact, all of the BN Divisions operating in Montana intersect in only one county (Yellowstone), which is where Montana's largest city (Billings) is located. Moreover, while BN has more total employees in Havre than in Billings, the claim agents and legal counsel who handle BN's tort actions are located primarily in Billings. *See generally* Deposition of Mark Bruce (BN's Rule 30(b)(6) witness), *Ford and Johnson v. Burlington N. R.R.*, Nos. DV-89-974, -89-975 (Dec. 19, 1989). These facts demonstrate that identifying a single Montana residence for BN would be essentially arbitrary and might even lead to different conclusions by different Montana courts.

because *Saunders* is readily distinguishable and because it is probably no longer good law even on its own terms. In *Saunders*, this Court struck down an Arkansas statute providing that a suit against a domestic corporation could be brought in "a[ny] county where it has a place of business or in which its chief officer resides," whereas a suit against a foreign corporation could be brought "in any county in the state." 274 U.S. at 491, 492. From the point of view of equal protection analysis, that statute differs significantly from the one at issue here. In particular, given the venue applicable to domestic corporations in *Saunders*—*anywhere* they have an office—there was no apparent reason for applying a different rule to foreign corporations that had offices within the State, especially because it is equally easy to identify the places where foreign and domestic corporations actually have an office. In contrast to the statute in *Saunders*, however, the Montana statute premises venue on a *single* residence. *See* MCA § 1-1-215(2) (1991) (individual or corporation can "only [have] one residence"). And based on *that* legitimate state choice, the distinction that Montana draws between domestic and foreign corporations is, as we have already shown, entirely reasonable.

Petitioner's reliance on *Saunders* is also misplaced because the case lacks any contemporary vitality. Thus, as noted earlier, Justice Holmes (joined by Justice Brandeis) dissented in *Saunders*, explaining that "[a] statute has to be drawn with reference to what is usual and probable. A foreign corporation merely doing business in the State and having its works elsewhere will be more or less inconvenienced by being sued anywhere away from its headquarters, but the difference to it between one county and another is likely to be less than it will be to a corporation having its headquarters in the State." 274 U.S. at 498. Shortly after *Saunders*, this extremely lenient view of equal protection analysis in venue cases was effectively adopted in an opinion written by Justice Holmes for a unanimous Court. *Bain Peanut Co. v. Pinson*, 282

U.S. 499 (1931). That case involved a Texas venue statute providing broader venue for corporations than for individuals. Echoing his views in *Saunders*, Justice Holmes wrote that "[i]n deciding whether a corporation is denied the equal protection of the laws when its creator establishes a more extensive venue for actions against it than are fixed for private citizens we have to consider not a geometrical equation between a corporation and a man but *whether the difference does injustice to the class generally, even though it bear hard in some particular case.*" *Id.* at 501 (emphasis added). *See also Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580 (1935) (statute prohibiting foreign but not domestic corporations from imposing contractual limitation on time for bringing suit does not violate equal protection).

More recently, the Court in *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976), upheld a Texas venue statute allowing for transfers in a way that provided domestic corporations with "some measure of discovery" regarding the merits of the case—an opportunity that was not available to foreign corporations. *Id.* at 644. Even though the Court determined that it had no need to pass on the current force of *Saunders* (*see infra* note 19), it nevertheless went out of its way to note that "more recent decisions raise the question whether *Saunders* continues to be good law." *Id.* at 646 n.6 (citing cases). Moreover, Chief Justice Burger, joined by then-Justice Rehnquist, concurred in *Starnes*, resting squarely on the analysis in Justice Holmes's *dissent* in *Saunders* and his *majority* opinion in *Bain Peanut*. Thus, while *Saunders* has not been expressly overruled, the case has been confined to its specific facts.

Indeed, even BN appears to have taken this view of *Saunders* and its progeny as recently as four years ago, when it urged the Montana Supreme Court to reject a venue challenge based on a distinction between in-state and out-of-state plaintiffs. *See* Appellant's Br. in *Haug*

v. Burlington N. R.R., supra.[12] In that case, relying on the *Starnes* Court's quotation of the opinion in *Cincinnati Street Ry. v. Snell*, 193 U.S. 30, 36-37 (1904), BN flatly asserted that "[d]ifferent venue treatment does not result in denial of equal protection and is not otherwise unconstitutional." Appellant's Br. in *Haug* at 5.[13] There is no reasoned basis for BN to have reversed course here. And if *Saunders* is a dead letter, it follows automatically that BN's claim in this case is meritless.

The other cases that BN relies on are equally unhelpful to its cause. In the first place, several of those cases *upheld* classifications that directly discriminate against foreign corporations, thus tending to support respondent's position, not petitioner's. *See, e.g., Western & Southern Life Ins. Co.*, 451 U.S. at 662-68 (upholding retaliatory state tax imposed only on foreign corporations); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982) (upholding statute that tolled statute of limitation for foreign corporations that did not register). Second, the equal protection cases striking down differential treatment for foreign corporations involved discriminatory taxes that

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[12] The specific discrimination alleged in *Haug* was between out-of-state plaintiffs who could bring tort suits in any county in Montana and in-state plaintiffs who could only sue in the county where the tort was committed. Appellant's Br. in *Haug* at 5.

[13] BN quoted the following language from *Starnes* quoting *Snell* (425 U.S. at 644-45, quoting 193 U.S. at 36-37):

> [I]t is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights. Given therefore a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the State has deemed best to provide for a trial in one forum or another. It is not under any view the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail.

were "designed only to favor domestic industry within the State, no matter what the cost to foreign corporations seeking to do business there." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985); *see also ibid.* (citing the same cases as petitioner cites at Br. 20-21). The 128-year-old venue statute at issue in this case, by contrast, unquestionably was not "designed" to create—nor is there any reason to think it has the effect of creating—the kind of economic protectionism that is implicated by naked tax discrimination.[14] Finally, petitioner's citation to the line of equal protection cases involving discrimination against newly arrived residents (Br. at 21 n.24) is likewise inapposite—if for no other reason than that those cases generally relied on the effect of the challenged statute on the right to travel, a factor that is not present here. *See, e.g., Attorney Gen. v. Soto-Lopez*, 476 U.S. 898, 901-04 (1986) (plurality opinion) (discussing line of cases cited by petitioner).[15]

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[14] Notably, petitioner has not raised a Commerce Clause claim, which would, of course, require a showing of such protectionism. *See, e.g., Wyoming v. Oklahoma*, 112 S. Ct. 789, 800-02 (1992).

[15] Petitioner also attempts to buttress its claim by making two arguments that could be read to suggest that some kind of heightened equal protection scrutiny might be appropriate here. First, petitioner asserts that the tax discrimination cases it cites "have arisen in contexts where there is arguably more room for line-drawing than in judicial processes." Br. 21. But, as applied to a venue statute like that at issue here, petitioner's hierarchy of classificatory imprecision is exactly backwards. *See, e.g., Starnes*, 425 U.S. at 644 (" 'it is fundamental rights which the 14th Amendment safeguards and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights' ") (quoting *Cincinnati Street Ry. v. Snell*, 193 U.S. at 36).

Similarly, petitioner's assertion that a "non-resident is a prime example of someone whose interests should not be entrusted solely to the political processes," (Br. 21), is quite remarkable in the present context. Petitioner, after all, has premised its entire argument on the claim that it is, in substance, a *resident* of Montana. In any event, the notion that a powerful corporation like BN, which does substantial business and employs numerous people in Montana, is

c. Lacking any legal support for its position, petitioner resorts to the customary policy arguments about the evils of forum shopping, and then claims that the Montana venue statute exacerbates these general problems. Br. 32-34, 37-39; *see also* Amicus Br. of the Association of American Railroads 8-16; Amicus Br. of Washington Legal Foundation 6-16. While long on rhetoric, this argument is short on substance. As a legal matter, the forum shopping that petitioner complains about is simply not relevant to its equal protection claim; and as a factual matter, the suggestion that the Montana venue statute is leading to abusive practices against petitioner has no support.

Forum shopping has been a well-accepted part of our judicial system since its inception. *See, e.g., Ferens v. John Deere Co.*, 110 S. Ct. 1274, 1282 (1990) (plaintiff "has the option of shopping for a forum with the most favorable law"); *Van Dusen v. Barrack*, 376 U.S. 612, 634 (1964) (same). Indeed, while defendants generally have less opportunity to forum shop, they often file transfer or removal motions when such efforts offer the prospect of a tactical or legal advantage. The wisdom of allowing such practices by either party is, of course, subject to legitimate debate. But, as a constitutional matter, the issue is not whether more or fewer opportunities for forum shopping is a good thing; it is, rather, whether the rule that expands or limits such opportunities is based on a rational justification. And as we have already shown, the Montana statute adequately rests on just such a justification.

In any event, petitioner's own data refute the argument that BN is "being subjected to a virulent form of forum shopping [in Montana]." Pet. 17. According to petitioner (*see* Pet. 16), BN has had 195 FELA cases filed against it in Montana in the past six years. Of

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somehow disadvantaged in its ability to participate in the State's democratic processes cannot be taken seriously.

those, 55 were filed in the county where the tort was committed and, therefore, have no relevance to BN's residence-based claim (*id.* 19 n.21)[16]—except to emphasize that in at least a quarter of the cases the substantial advantages that supposedly accrue to a plaintiff by being able to select any court in the State had *no* magnetic force. Of the remaining 140 FELA cases against BN, 121 of them were filed in only two of Montana's 56 counties—Yellowstone and Cascade. *See* Pet. App. 40a-44a.[17] Those counties contain Montana's two main metropolitan areas—Billings in Yellowstone and Great Falls in Cascade—which have populations of approximately 115,000 and 75,000 respectively. It should be expected, therefore, that a substantial portion of state litigation—involving either domestic or foreign corporations—will be conducted in those cities because that is where the major law firms are located and where many of the large domestic corporations have their principal place of business. Petitioner cannot fairly claim these major cities—where *its* FELA defense lawyers and expert medical witnesses are generally located—are inconvenient or otherwise inappropriate places in which to litigate.[18]

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[16] Under Montana law, domestic corporations are similarly amenable to suit in the county where the tort is committed. MCA § 25-2-122(2) (1991).

[17] The remaining 19 FELA cases against BN were filed in 5 other counties.

[18] Petitioner further charges that Montana is becoming a magnet for FELA cases from "across the entire upper northwest region of the United States." Br. 38. This argument is likewise irrelevant and unsupported. In the first place, those cases, much like the in-state cases, have been filed almost exclusively in Great Falls and Billings (44 of 49 in the past six years). And most of the cases come from nearby towns in Wyoming, which are much less likely to have lawyers who are experienced in FELA cases or specialized medical personnel who are needed to evaluate and treat the complicated injuries that frequently lead to such lawsuits. Second, States are of course free to adopt this kind of "open forum" policy, *see, e.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), and the Montana Supreme Court has repeatedly indicated that if there

In sum, petitioner's data demonstrate that BN's protestations about open-ended exposure to litigation in 56 separate counties and abusive forum-shopping practices are empty. To the contrary, petitioner's smoke screen regarding forum shopping by plaintiffs merely distracts attention from BN's attempt to do some forum shopping of its own here. Havre, where BN claims it must be sued, is a small town near the Canadian border, inaccessible by air and thus almost certain to be inconvenient for plaintiffs and their lawyers and witnesses. Havre also happens to be a town where BN is the dominant employer and, therefore, where it may well expect more hospitable juries. A desire to secure those kinds of strategic advantages, while understandable, simply cannot properly be dressed in constitutional clothes. Petitioner's claim should be rejected.[19]

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is a substantial increase in out-of-state FELA litigation, it will reconsider its rule against using the *forum non conveniens* doctrine to return FELA cases to their home States. *See, e.g., Labella*, 595 P.2d at 1187. BN attempted to make such a showing recently, but it was only able to point to *seven* out-of-state FELA cases that were pending in the Montana courts in 1986. The Montana Supreme Court held that seven cases in a State "where there are over 16,000 civil cases filed statewide per year is not a significant number of cases as to require the exercise of our power of supervisory control." *State ex rel. Burlington N. R.R. v. District Court of the Eighth Judicial Dist.*, 746 P.2d 1077, 1080 (Mont. 1987). In the five years since then, it appears that an additional 42 out-of-state FELA cases have been filed against BN in Montana. Pet. App. 40a-41a. An average of eight such cases per year hardly indicates that Montana is a "haven" for this kind of litigation. By way of comparison, the Amicus Brief of the Association of American Railroads points out that between 1988 and 1990 an average of 215 out-of-state FELA cases per year were filed in West Virginia; and that BN alone had 102 such out-of-state cases pending against it in state court in St. Louis on September 15, 1991, even though Missouri's venue statute treats domestic and foreign corporations identically. Amicus Br. 12-14.

[19] Although we have addressed petitioner's argument on its own terms—*i.e.*, by showing that the Montana venue statute rationally furthers a legitimate state interest—the Montana Supreme Court,

CONCLUSION

The judgment of the Montana Supreme Court should be affirmed.

Respectfully submitted,

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as we noted at the outset, rejected the claim on a narrower ground. In particular, the court followed the approach in *American Motorists Ins. Co. v. Starnes*, where this Court concluded that it need not determine whether there was a reasonable basis for a Texas venue statute that treated foreign and domestic corporations differently, because the distinction, in practice, conferred no "appreciable advantage" on domestic corporations. *Id.* at 644. In the present case, the court below, relying primarily on the strongly pro-plaintiff venue provision of FELA, similarly found that Montana's venue statute was "nondiscriminatory in operation." Pet. App. 15a. The court's reasoning is set forth fully in its opinion and summarized above. *See supra* p. 4. It is also supported at length by the *amici curiae* briefs filed in support of respondents. *See* Amici Curiae Br. of the States of Montana, *et al.*; Amicus Curiae Br. of the Montana Trial Lawyers Ass'n. In our view, based on *Starnes*, this alternative analysis also provides an independent ground on which to affirm the judgment below.

FOR ARGUMENT

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

No. 91-779

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Supreme Court of the United States

OCTOBER TERM, 1991

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Petitioner,

v.

WILLIAM D. FORD,
Respondent.

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

THOMAS L. JOHNSON,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Montana

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[1] The parties to the proceeding below and Rule 29.1 statement appear in Pet. Br. at ii, and no changes have occurred with respect to the latter.

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Petitioner's opening brief argued that the Equal Protection Clause of the Fourteenth Amendment assures a right to equal treatment for foreign corporations under state venue laws. The briefs of respondents and their amici do nothing to diminish the importance of venue rules to a convenient and fair place for trial.[2] To the contrary, their responsive briefs reaffirm that venue is

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[2] The amici in support of respondents are the States of Montana, New Mexico, North Dakota, South Dakota, Texas, and Wyoming

a vital matter in the give-and-take of civil litigation. Indeed, as to the specific issue in this case, the Montana legislature is quoted to the effect that "the *most fundamental of all venue rules* [*is*] *that the defendant has the right to have the trial in his county of residence.*" [3] This leaves only the question whether a state can confer substantial venue advantages to Montana-incorporated companies while denying these same advantages to "foreign" corporations that have been admitted to do business in the state.[4]

I. THERE IS NO RATIONAL BASIS FOR THE DISPARATE TREATMENT OF FOREIGN CORPORATIONS UNDER MONTANA VENUE LAW

Respondents agree that Montana's "any county" rule with respect to foreign corporations originated in *Pue v. Northern Pac. Ry.*, 78 Mont. 40, 252 P. 313, 315 (1926), in which the Montana Supreme Court held that "unless [a foreign corporation] is given a domestic residence by some statutory provision, it remains a nonresident of the state and comes within the provision that such person may be sued in any county of the state." *See* Resp. Br. at 1-3. The Montana trial lawyers emphasize the legisla-

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("States' Br.") and the Montana Trial Lawyers Association ("MTLA Br.").

[3] MTLA Br. at 3 (quoting Montana Code Annotated (1991) ("MCA"), ch. 2, § 25-2-118, at 15-16) (Venue)) (emphasis added).

[4] BN unquestionably has standing to challenge the Montana venue law as discriminatory. BN is disadvantaged in that a comparable domestic corporation—one that does business in numerous counties—could be sued in only one county in this case, whereas BN can be sued in any county. This application of state law suffices to create standing. *See, e.g., Barrows v. Jackson*, 346 U.S. 249, 255-56 (1953). Indeed, it is amici that would have this Court address a hypothetical situation: a state venue law permitting a foreign corporation to be sued in any county in which it does business, but not elsewhere. States' Br. at 3-7. This Court also will not apply prudential standing doctrines where standing was not challenged below and the constitutional questions have been effectively presented. *See, e.g., Craig v. Boren*, 429 U.S. 190, 193-94 (1976).

tive history of the 1985 revision of the Montana venue statute, but the only explanation in that legislative history is a reiteration of the abstract reasoning of *Pue*:

> Since, by definition, a nonresident of the state is not resident in *any* county, the basic rule of subsection (1) cannot apply. In this situation the statute has always given the right of choosing venue to the plaintiff, and this draft contemplates no change.

MTLA Br. at 3 (quoting MCA, ch. 2, § 25-2-118, at 15-16 (Venue)). *See also* Resp. Br. at 2-3 (quoting same history and relating it to *Pue*).

The problem with respondents' position is that the *Pue* "by definition" rationale is not a *rational* basis for the statutory discrimination. The statement in *Pue* is tautological: it does not refer to any state policy that is furthered by the discrimination. As traced in petitioner's brief, *Pue* had its origins in the metaphysical notions of corporate existence prevalent in the middle to late nineteenth century. Pet. Br. at 25 n.28. Even in 1926, *Pue* was a throwback to a bygone era of corporate and constitutional law in which it was believed that a corporation could not have an existence outside its state of incorporation. When respondents cite *Pue*, they do so with "citations omitted." Resp. Br. at 2. Each of the cases cited in *Pue* in support of the concept that a foreign corporation "cannot" have an in-state residence for purposes of venue has been overruled in the state in which it was decided.[5] Thus, the *Pue* theory has been thoroughly discredited.

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[5] *See Pue*, 252 P. at 315. *Boyer v. Northern Pac. Ry.*, 66 P. 826 (Idaho 1901), was overruled by *Banning v. Minidoka Irrig. Dist.*, 406 P.2d 802, 804 (Idaho 1965); *Eickhoff v. Fidelity & Casualty Co.*, 76 N.W. 1030 (Minn. 1898), was overruled by *State ex rel. Twin City & S. Bus Co. v. District Court of Otter Tail County*, 225 N.W. 915, 916 (Minn. 1929), and later by *Smith v. Utah Home Fire Ins. Co.*, 47 N.W.2d 785 (Minn. 1951); *Waechter v. Atchison, T. & S. F. Ry.*, 101 P. 41 (Cal. 1909), was overruled by *Hale v. Bohannon*, 241 P.2d 4 (Cal. 1952); and *Stone v. Travelers Ins. Co.*, 78 Mo. 655 (1883), was overruled by *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (Mo. 1962). *Rhodes v. Salem Turnpike & Chelsea*

From any practical perspective, there is no basis for the notion that a foreign corporation is wholly incapable of establishing a residence outside of its state of incorporation. A number of other states have explicitly enacted statutes permitting foreign corporations to establish an in-state residence for purposes of venue.[6] In many other states, judicial interpretation has reached the same result.[7] That Montana does not permit foreign corporations to domesticate themselves in this manner is an integral element of the discrimination here, rather than a proper justification for it. Thus, the sole rationale actually advanced by the Montana legislature falls well short of supplying a rational basis for the discrimination in venue against foreign corporations.

If a state legislature has clearly expressed its statutory purpose, otherwise "conceivable" grounds need not and should not be considered.[8] Here, the Montana legislature clearly adopted the *Pue* "by definition" rationale. The briefs confirm that the legislative history is definitive with respect to the legislative purpose. The Montana

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Bridge Corp., 98 Mass. 95 (1867), involved application of the venue statute to a domestic corporation and did not discuss nonresident corporations.

[6] *See* state laws cited in Pet. Br. at 16 & n.19.

[7] *See* cases cited in Pet. Br. at 15-16 & n.18.

[8] *See Zobel v. Williams*, 457 U.S. 55, 61 n.7 (1982) (three purposes having been enumerated in the statute, "we need not speculate as to the objectives of the legislature"); *Lindsey v. Normet*, 405 U.S. 56, 70 n.18 (1972); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530 (1959) ("[h]aving themselves specifically declared their purpose, the Ohio statutes [challenged in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949)], left no room to conceive of any other purpose for their existence"); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) ("In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'") (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975)).

trial lawyers assert that "[i]t is hard to imagine a state having a more comprehensive up-to-date legislative history than Montana's 1985 total revision of its venue statutes." MTLA Br. at 4; *see also* Resp. Br. at 8 & n.7. The Montana Supreme Court supplied no independent rationale. *See* Pet. App. 9a. Under these circumstances, other arguments in favor of the disparate treatment are entitled to little, if any, consideration. This is particularly true when none of the additional legislative purposes now being put forward were presented to the Montana courts, let alone adopted by them.

In any event, the purposes now presented do not provide a rational basis for the discrimination woven years ago into the Montana venue scheme. Respondents' main argument is that the purpose of the Montana venue law "is to promote the convenience of *residents* . . . ." Resp. Br. at 6 (emphasis added). This, of course, begs the question of why foreign corporations with a registered agent and a place of business in the state are not afforded the same venue advantages as domestic corporations. Respondents attempt to bridge this gap with an unsupported, and insupportable, assertion that "foreign corporations . . . normally will not derive similar benefits from being sued at a particular location in the state." Resp. Br. at 6; *see also id.* at 9 ("convenience considerations are usually inapplicable to foreign corporations"). To the contrary, any foreign corporation with a place of business in the state will derive precisely the same benefits of convenience from being sued at that location. There is no rational fit between the convenience interest and the Montana venue law that is supposedly its result.

Respondents' theory ignores modern corporate reality. Literally thousands of major U.S. corporations are, like petitioner, incorporated in Delaware and have a principal office in each state in which they do business. Like petitioner, these foreign corporations have their responsible local officers and their books and records at their headquarters within the state. The alleged state goal of

serving the convenience of defendants requires that each of these foreign corporations be sued in its principal place of business within the state. The fact that there are also some foreign corporations that "are not present" at all in Montana, or are present "only through the use of transient personnel," Resp. Br. at 9, cannot justify a denial of equal venue treatment to those corporations doing business in Montana whose only real difference from domestic Montana corporations is the state of incorporation.[9] That goal of convenience is *not* served by making each of these corporations subject to suit in *every* county in the state.[10]

In straining to defend the rationality of Montana's statute, respondents and their amici exaggerate the diffi-

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[9] Respondents cite *Quill Corp. v. North Dakota*, No. 91-194 (U.S. pending), in this connection. But *Quill* involves an out-of-state mail order operation with no fixed place of business in the state. This exceptional, if not extreme, situation does not provide an appropriate archetype for the foreign corporation. In *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927), the Court focused on foreign corporations with fixed places of business in the state. *See id.* at 494 ("We speak only of them.").

[10] An additional fallacy in respondents' theory is that the favorable treatment in the Montana venue law is not limited to corporations that have their principal place of business in Montana. The determinative factor under the Montana venue statute for establishing domestic corporation status is *incorporation* in Montana. MCA § 35-1-113 defines a "domestic corporation" as one which is "not a foreign corporation and that is incorporated under or subject to the provisions of this chapter." A "foreign corporation" is one which is "incorporated under a law other than the law of this state." MCA § 35-1-113(10). In *Pue*, the Montana Supreme Court relied on the common law precept that "a corporation could not migrate from the state of its creation," thus focusing on the defendant's state of incorporation. 252 P. at 314-15. Thus, a Montana-incorporated company with its principal place of business outside the state—for instance, the Red River Valley & Western Railroad—qualifies for preferred treatment in venue. If convenient access to officers and records of the corporation were the objective of the statutory distinction, then focusing on the defendant's state of incorporation would make no sense.

culty plaintiffs would experience in identifying the Montana "residence" of a foreign corporation doing business in the state. No such issue exists in this case, where petitioner's principal place of business in the state is manifest and was accepted by the Montana Supreme Court. Pet. App. 4a. Furthermore, there is no reason to suppose that identification of the principal in-state place of business of a foreign corporation will be any more difficult than for a domestic corporation. At the time this case arose, a domestic corporation in Montana was *not* required to designate its principal place of business in its incorporation papers or annual report.[11] Respondents themselves assert that "there has never been a case raising a question about the appropriate residential venue for a domestic corporation." Resp. Br. at 13. The discretion of a foreign corporation in establishing or identifying its principal office was, and is, no broader than that of a domestic corporation.

If the State is genuinely concerned that there could be uncertainty, any doubt could be avoided through the simple expedient of a requirement that all foreign corporations identify their principal in-state place of business in a corporate filing with the State. In fact, for 74 years (from 1893 through 1967) Montana required foreign corporations admitted to do business to submit an annual certificate designating their principal place of business in the state.[12]

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[11] As respondents point out, domestic corporations were required to identify the addresses of their officers and directors, Resp. Br. at 2, which might or might not indicate the corporation's principal place of business. Not until 1991, after this case arose, did Montana unambiguously require domestic corporations to designate a principal place of business. MCA § 35-1-1104.

[12] This provision, first included in an Act passed in 1893, required foreign corporations to file with the Secretary of State a certificate stating "the principal place of business of such corporation *in this state*." Mont. Code tit. XI, § 1030(1) (1895) (emphasis added). A similar requirement was re-enacted as MCA § 15-1701(1) (1947), and remained on the books until 1967.

Respondents' hypothetical of a foreign corporation that owns and operates three drug stores in different counties in the state is illustrative of petitioner's point. *See* Resp. Br. at 13-14. Whatever difficulty a plaintiff would have in identifying a principal place of business if the corporation were incorporated in another state, the plaintiff would also have if the corporation were incorporated in Montana. Moreover, given the obvious feasibility of designation requirements, as enacted in many states, these uncertainties would not be significant regardless of the state of the defendant's incorporation. *But most important, the supposed difficulties in choosing among the three counties cannot conceivably justify opening up the defendant corporation to suit not only in all three of those counties, but also in all of the other fifty-three counties in Montana.* Merely because Montana currently affords no recognition of a foreign corporation's principal place of business in the state does not entitle it to impose an "any county" venue rule for these defendants that ignores their convenience altogether. Montana venue law is the product of fiat, not reason.

Respondents repeatedly proffer the dissent in *Saunders* as supporting their concept of convenience. *See* Resp. Br. at 10-11, 15-16. Not even that dissent, however, offers much support. Justice Holmes hypothesized that "[a] foreign corporation merely doing business in the State *and having its works elsewhere* is more or less inconvenienced by being sued anywhere away from its headquarters." 274 U.S. at 498 (Holmes, J., dissenting, joined by Brandeis, J.) (emphasis added). Thus, Justice Holmes was *not* addressing a situation such as petitioner's, with substantial working assets and a large headquarters and staff located in the state.

In addition, the majority in *Saunders* found Justice Holmes' hypothetical inapposite to the situation before the Court. The majority focused instead on the discrimination against "foreign corporations doing business within the State by her permission, and therefore having a fixed

place of business therein and a resident agent on whom process may be served." *Id.* at 494. The Court recognized that "*considerations of convenience and economy*" might well motivate the restriction of venue for domestic corporations, but expressly concluded that "*these considerations have equal application to foreign corporations.*" *Id.* (emphasis added). A convenience rationale cannot be any more compelling in this case, after six decades of expansion of multistate businesses across state lines.

Respondents contend that, at worst, the Montana venue scheme is only a little under- or over-inclusive. Resp. Br. at 5, 12, 14. But the central flaw in the Montana venue law is that it treats foreign corporations with a fixed place of business and registered agent in the state—surely the largest group of foreign corporations and that most likely to become involved in state court litigation—in a manner different from their domestic counterparts. Foreign corporations that do not enter the state at all cannot be made the paradigm for the state venue law. *Saunders* holds that the relevant comparison is between domestic corporations and their foreign counterparts with a fixed place of business and a registered agent for service of process in the state. 274 U.S. at 140. Respondents attempt here to cast a classification functionally identical to the *Saunders* statute as tolerably over-inclusive, but this is an empty rhetorical exercise. Called by any name, the Montana venue law must be stricken on the authority of *Saunders*.

One last candidate is presented for a "rational basis" for the discrimination in Montana venue law: the alleged advancement of the State's interest in helping injured persons to hold foreign corporations accountable for their injuries.[13] There is no basis in Montana law, however,

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[13] Tellingly, this rationale is not advanced either by respondents, the plaintiffs in the underlying case, or by the plaintiffs' trial lawyers association, just as it was not mentioned below by any of the Montana courts. Even the States raise it in a half-hearted fashion, quoting a concurring opinion of this Court, which in turn quotes an intermediate state court that expressly recognized that the "justifi-

to believe that enforceability of judgments is more difficult when the defendant is a foreign corporation than when it is a Montana-incorporated company.[14] In Montana, enforcement of a judgment against a foreign corporation is just as certain and as uncomplicated as it is against a domestic corporation. Once a judgment has been rendered, it is enforced through a writ of execution on the judgment debtor's property, both real and personal. MCA § 25-13-501. The execution may be issued simultaneously to the sheriff or levying officer of *every* county in Montana for enforcement. MCA § 25-13-401. Thus, it is no more burdensome for a plaintiff in Montana to enforce a judgment against a foreign corporation doing business in the state than against any other defendant. The "accountability" argument of amici on behalf of respondents provides no more rational basis for venue discrimination against foreign corporations than any of the other rationalizations advanced in its favor.[15]

Of course, the convenience and enforceability considerations mentioned by amici may justify a distinction between resident and nonresident *individuals*. Unlike foreign corporations licensed to do business in the state,

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cation is less evident" as to foreign corporations licensed to do business in a state. States' Br. at 13-14 (quoting *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 647 (1976) (Burger, C.J., concurring, joined by Rehnquist, J.) (quoting *Commercial Ins. Co. v. Adams*, 366 S.W.2d 801, 808-09 (Tex. Civ. App.), *aff'd*, 369 S.W.2d 927 (1963))).

[14] Petitioner has already explained how Montana law ensures ready service of process on foreign as well as domestic corporate defendants. Pet. Br. at 27.

[15] Respondents' only reference to the rationale actually relied on by the Montana Supreme Court—that the discrimination in this case was justified by the asserted pro-plaintiff policies of the FELA—is the suggestion in a footnote that this might provide an "independent ground on which to affirm the judgment below." Resp. Br. at 21-22, n.19. That rationale has been fully refuted in petitioner's opening brief, Pet. Br. at 27-32, and neither respondents nor their amici have made any effort to answer that analysis.

nonresident individuals will not have a registered office or a designated agent for service of process. Thus, nonresident individuals may present different issues with respect to effective service and enforcement of judgment. Moreover, nonresidents who do not enter the state or who are truly transient do not implicate the same convenience considerations as a foreign corporation with a fixed place of business in the state.[16]

Thus, considerations of convenience and enforceability may justify some different rules for individuals and aliens. But they do not justify wide-open venue for corporations whose only different attribute is incorporation in another state. A venue system for U.S. corporations that is predicated solely on that distinction is irrational, and cannot survive even the most lenient equal protection test.

II. *SAUNDERS* REMAINS CONTROLLING PRECEDENT

This Court's decision in *Saunders* resolves virtually all of the issues raised by respondents. *Saunders* deals with a similar fact situation, indicates that a state must deal realistically with foreign corporations that have a fixed office within the state, and rejects the notion that all locations within a state are equally convenient to such a foreign corporation. Respondents claim they would merely limit *Saunders* to its facts, but they effectively ask this Court to overrule it. That would be a surprising fate for a decision that has not proved unworkable or even contro-

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[16] Respondents also advert to the federal statute prescribing venue for alien corporations, 28 U.S.C. § 1391(d) (1988). However, venue for an entity incorporated in a foreign country raises different concerns than for one incorporated in the United States—including concerns relating to enforcement abroad. In any event, all defendants in the federal courts, including alien corporations, are protected by the federal transfer provisions (28 U.S.C. § 1404(a) (1988)) with regard to a totally inconvenient venue—a remedy whose analog (*forum non conveniens*) the Montana courts have specifically denied to FELA defendants.

versial, but rather has been woven into the laws of most states, and has been cited as authoritative by this Court.

Initially, respondents seek to distinguish *Saunders* on the ground that it involved a statute permitting suit against a domestic corporation in *any* county where it had an office, whereas the statute here limits suit against a domestic corporation to its *principal* place of business in the state. *See* Resp. Br. at 15. This argument turns equal protection analysis on its head. Respondents would *invalidate* a statute that permitted statewide venue against foreign corporations when domestic corporations could be sued wherever they did business. Yet respondents' theory would *approve* the same statewide venue against foreign corporations when domestic corporations could be sued in only a single county. The result of respondents' theory is that a moderate amount of discrimination in venue would be prohibited by the Equal Protection Clause, but an extreme discrimination would go unchecked.

The real point of *Saunders* is that, as "pertinen[t] to the venue of transitory actions," the "situation" of "foreign corporations doing business within a state by her permission, and therefore having a fixed place of business therein and a registered agent" is "not distinguishable from that of domestic corporations." 274 U.S. at 494. That principle controls the case at bar.

Implicitly conceding the weakness of their purported distinction, respondents urge that *Saunders* is "probably no longer good law." Resp. Br. at 15. Respondents stop just short of suggesting that a decision of this Court has overruled *Saunders*. Rather, their argument proceeds from the assumption that the decision in *Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1931), issued just four years after *Saunders*, somehow constituted an adoption by the Court of the views expressed in the *Saunders* dissent. *See* Resp. Br. at 15. Since five members of the Court that decided *Bain Peanut* had joined in the major-

ity opinion in *Saunders*, it seems highly unlikely that they would have repudiated their own prior decision and endorsed the dissent without even mentioning that fact.

Respondents' argument seems to be based on nothing more than the fact that the author of the unanimous opinion in *Bain Peanut* was Justice Holmes, who had dissented in *Saunders*. But the *issues* in *Bain Peanut* were entirely different from those in *Saunders*. In *Bain Peanut*, the Court merely reaffirmed the conclusion previously reached in *Cincinnati State Ry. v. Snell*, 193 U.S. 30 (1904), that, in view of the differences between corporations and individuals, the two classes need not be treated identically for venue purposes. 282 U.S. at 501-02. Thus, the Court noted, "there is likely to be such a difference between the business done by a corporation and that done by a private person that the State may well take it into account when it permits a corporation to be formed." *Id.* at 501.

The reasoning of *Bain Peanut* is to be distinguished from the reasoning of the *Saunders* dissent, which was predicated primarily upon the asserted power of a state to condition entry on a foreign corporation's relinquishment of its constitutional right to equal venue treatment,[17] as well as on certain supposed differences between foreign and domestic corporations. Thus, *Bain Peanut* involved a different issue from that addressed in *Saunders*, and the coincidence that the author of that decision had dissented in *Saunders* cannot be read to undercut *Saunders*.

The only other support offered by respondents for the claim that *Saunders* is no longer good law is the notion that the Court in *American Motorists Insurance Co. v. Starnes*, 425 U.S. 637 (1976), somehow overruled *Saun-*

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[17] This aspect of Justice Holmes' dissent was flatly rejected by the majority in *Saunders*. 274 U.S. at 497. The view of the *Saunders* majority is now, of course, settled law. *See Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 657-658 (1981).

ders sub silentio. See Resp. Br. at 16. Respondents' argument is based solely on *dicta* in a footnote in *Starnes* that cites three decisions as "rais[ing] the question whether *Saunders* continues to be good law." *Id.* at 645 n.6. But, apart from their *Bain Peanut* argument, respondents make no effort to show how any of the cited decisions actually cast doubt on the continuing validity of *Saunders*.[18] BN has previously demonstrated that none of the cases mentioned in the *Starnes* footnote in fact call *Saunders* into question. *See* Pet. Br. at 36 n.37. Though challenged to connect the language of the *Starnes* footnote to its citations, respondents present no such analysis.[19]

Finally, *Saunders* does not stand as an isolated case outside the mainstream of Court precedent. To the contrary, the Court has frequently invalidated other statutes by which states discriminated against nonresidents and in favor of residents. *See* Pet. Brief at 11-12, 19-22. Respondents offer little rebuttal to the cases that comport with the reasoning of *Saunders*.[20] If anything, the rea-

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[18] Indeed, although respondents single out a quotation from one of those cases, *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580 (1935), they conveniently ignore the fact that *Brownell* itself explicitly relied on *Saunders* as establishing the controlling standard by which the equal protection claim there at issue must be judged. *See* 294 U.S. at 583.

[19] Respondents and amici trial lawyers attempt to discredit BN's arguments by citing to certain views stated in a brief filed by petitioner with the Montana Supreme Court several years ago in another case. Resp. Br. at 16-17; MTLA Br. at 6-7. But the quoted material consisted of little more than a quotation from this Court's *Snell* decision, and was made in a case involving a proposed interpretation of a venue statute that would have favored *nonresidents* over residents.

[20] *See* Pet. Br. at 11-12, 18-22. Respondents also fail to distinguish the cases finding an equal protection violation in the discriminatory treatment of new residents of a state in favor of long-time residents. While the Court in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 911 (1986), relied upon the right to travel, it relied also upon the Equal Protection Clause as grounds for its decision.

sons to avoid arbitrary distinctions based on place of incorporation have grown stronger, as multistate business enterprises have become the rule, rather than the exception. *Saunders* remains good law and sound constitutional analysis.

III. MONTANA VENUE LAW EFFECTS REAL AND SUBSTANTIAL DISCRIMINATION AGAINST FOREIGN CORPORATIONS

Respondents and their amici variously attempt to trivialize this case by asserting that BN does not suffer any "real and substantial discrimination" under the "any county" rule in Montana, MTLA Br. at 8-13, and by complaining that BN is "attempt[ing] to do some forum shopping of its own here." Resp. Br. at 21. But improper venue either is or is not sufficiently important to be injurious, and the clear thrust of respondents' and their supporters' briefs is that venue *is* important.

Respondents therefore cannot force this case into the mold of *American Motorists Insurance Co. v. Starnes*, 425 U.S. 637 (1976). In that case, oral argument revealed that in actual practice the theoretical discovery advantage afforded domestic corporations did not exist. *Id.* at 643, 645. In addition, the broader geographic venue against foreign corporations was not challenged by the defendant in *Starnes* and was never addressed by the Court. *Id.* at 645-46; *see also* Pet. Br. at 34-36.

By contrast, the Montana venue law results in real and substantial discrimination.[21] Respondents have conceded

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In *Zobel v. Williams*, 457 U.S. 55 (1982), Justice O'Connor's concurrence was based on the right to travel, *id.* at 72, but the majority based its decision upon an equal protection analysis, *id.* at 60 n.6. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), and *Williams v. Vermont*, 472 U.S. 14 (1985), did not discuss the right to travel at all and nevertheless found violations of the Equal Protection Clause.

[21] The suggestion of MTLA that discrimination between classes of defendants in the provision of venue is somehow unworthy of constitutional complaint cannot be sustained under the Court's

the importance of venue in Montana by their own argument advancing convenience of the defendant as the crucial concern of the statute. *See* Resp. Br. at 8-11. Yet convenience applies as much to BN as to other, Montana-incorporated companies. BN's entire Montana Division is directed from Hill County. JA 20-21. The division's general manager, other management employees, and over half of all its Montana work force, plus its payroll and personnel files, are located there. *Id.*[22] The denial to BN of a venue residence in its home county in Montana puts BN at a real and substantial disadvantage as compared to its Montana-incorporated counterparts.

Respondents and amicus MTLA suggest that BN selected its principal Montana place of business in Hill County to inconvenience potential plaintiffs. But the reason for BN's selection of Havre as its Montana headquarters is apparent from any railroad map—Havre is located almost in the center of the BN main line across Montana, and is one of the largest towns on that line.[23] From a business standpoint, it is the logical location from

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precedents. *See, e.g., Saunders*, 274 U.S. at 495 (rejecting as "strained and inadmissible" the notion that *Snell* held venue provisions to be beyond the scope of the Equal Protection Clause).

[22] The fact that BN regularly retains counsel in Yellowstone and Cascade Counties to handle cases filed against it in those courts reflects only the fact that the suits are being filed in those two counties. It is not a relevant factor in determining the location of BN's principal office in Montana.

[23] Montana trial lawyers note that BN transferred a substantial number of employees from Yellowstone County to Hill County and imply that the purpose of this change was to create a different venue for litigation. But in 1988, BN sold over 600 miles of line (including most of its former main line through Yellowstone County) to a newly formed carrier, Montana Rail Link. *Montana Rail Link, Inc.— Exemption Acquisition & Operation—Certain Lines of Burlington N. R.R.*, Finance Docket No. 31089 (ICC Nov. 17, 1988). With the elimination of this line from the BN system, the number of employees in Yellowstone County and the functions performed there naturally declined, leaving the northern line as the hub of BN's Montana operations.

which to manage the Montana operations.[24] In any event, in seeking to have its principal place of business in Montana treated as its county of residence for venue purposes, petitioner seeks only the same rights enjoyed by domestic Montana corporations.

Once hauled into court in an inconvenient and unfair venue in Montana, an out-of-state corporate defendant cannot escape the resulting disadvantages. The disparate treatment does not dissolve as it did in *Starnes*. The convenience factors remain. The cited procedural safeguards do not cure the discrimination against foreign corporations. *See* MTLA Br. at 9-13. If those rules were as effective as amicus suggests, the discrimination experienced by BN in Montana would be far less acute. BN obviously takes full advantage of these remedies, where appropriate. However, it is evident that they have not levelled the playing field in these two Montana counties. Plaintiffs from distant states continue to file there, even though higher litigation costs may be involved. *See* Petition at 15-17 & nn. 21-22 and Pet. App. at 40a-41a. In addition, the verdicts are, on average, higher than elsewhere in Montana. *See* Reply Br. in Support of Petition at 7 & n.14.

The unusually high jury verdicts that cause plaintiffs to flock to Cascade and Yellowstone Counties do not ordinarily result from specific prejudice or self-interest that could be remedied by challenge to a particular juror or recusal of a judge. They result from the local culture of those counties and their jury venires. It is a recognized fact of trial practice that juries in certain locations are predisposed toward plaintiffs and toward generosity in

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[24] As one might expect of the chosen hub of a railroad's operations, Havre is by no means inaccessible. There are multiple daily flights between Havre and Billings, with connections to other cities in Montana and elsewhere. Havre is also served by Amtrak, and U.S. Highway 2 passes directly through the town.

damages.[25] The procedural safeguards cited by MTLA cannot and do not serve to eliminate the fundamental disadvantage of being dragged into court in a hostile venue. Amicus points to the statutory provision for obtaining a transfer of venue on grounds of *forum non conveniens*, but, as previously demonstrated, the Montana Supreme Court has explicitly held that the doctrine of *forum non conveniens* is not available in FELA cases such as this.[26] Nor does the statute providing for a change of venue when an impartial jury cannot be obtained offer much protection.[27] Thus, Montana, by providing only domestic corporations with a venue that limits their exposure to such forum-shopping, effects a real and substantial discrimination against foreign corporations.

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[25] Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* 82-83 (1991); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 Tul. L. Rev. 553, 556 (1989).

[26] *See, e.g., Haug v. Burlington N. R.R.*, 236 Mont. 368, 770 P.2d 517, 521 (1989) (citations omitted); *see also* Pet. Br. at 4 n.5.

[27] A request for a change of venue on grounds that an impartial jury cannot be obtained is within the district court's discretion to grant. *Guthrie v. Montana Dep't of Health & Envtl. Sciences*, 172 Mont. 142, 561 P.2d 913, 915 (1977); *Putro v. Mannix Elec., Inc.*, 147 Mont. 314, 412 P.2d 410, 412 (1966). Similarly, the determination whether to accept a challenge to a juror for cause rests in the judge's discretion and will rarely be overturned on appeal. *See* MCA § 25-7-223; *Anderson v. Burlington N., Inc.*, 218 Mont. 456, 709 P.2d 641, 646 (1985), *cert. denied*, 476 U.S. 1174 (1986) (upholding trial judge's denial of BN's challenge for cause of a juror who admitted that, as a shipper who utilized BN's services, he believed BN "grossly overcharg[ed] for its services").

Amicus MTLA also cites to statutes authorizing substitution of a judge without cause. But this does not really address BN's problem, which stems from the community culture that produces the jury venire. And even where it might be relevant, substitution of a judge can be effected only once, and the dismissed judge can continue to exercise substantial authority over such matters as drawing the jury, conducting preliminary pretrial conferences, and resolving other matters. MCA § 3-1-804.

As to the accusation that BN itself is engaging in forum shopping, the facts demonstrate otherwise. Plaintiffs and plaintiffs' counsel are the ones on the shopping spree here. Rationalizations that Great Falls and Billings are two of the larger cities *in Montana*, Resp. Br. at 20, cannot explain why plaintiffs are coming from states such as Washington, Wyoming, North Dakota, and South Dakota, and even from Colorado and Nebraska, to avail themselves of those two selected Montana locales. *See* Pet. App. at 40a-41a. The fact that many of the actions brought against BN in Montana, including the underlying cases here, are brought by out-of-state lawyers, belies the assertion that plaintiffs bring their cases in Great Falls and Billings "because that is where the major law firms are located . . . ." Resp. Br. at 20. Thus, there is far more to this pattern of forum shopping than respondents will admit.

Respondents ultimately exalt the type of forum shopping involved in this case, casting it as "a well-accepted part of our judicial system." Resp. Br. at 19 (citations omitted). Petitioner's objection, however, is not to forum shopping as such, but the fact that Montana has opened up an arbitrarily selected set of defendants to such extreme forum shopping. There is no reason to believe the Montana electorate would permit the Montana legislature to enact such a statute of general applicability, subjecting domestic and foreign corporations alike to "any county" venue. Indeed, such a statute would abrogate what the Montana legislature itself has termed "the most fundamental of all venue rules—that the defendant has the right to have the trial in his county of residence." *See supra* at 3 (quoting legislative history).

In sum, there is no rational basis for having tightly defined venue for domestic corporate defendants and wide-open, statewide venue for foreign corporations. All that BN is seeking is equal treatment under Montana's venue law, which confers on domestic corporate defendants the

right to be sued in the same county in which they have their principal place of business within the state. Under this Court's existing precedent, Montana's grant of this right to domestic corporations, and its refusal of the same right to foreign corporations that also have a fixed place of business in the state, constitutes a denial of equal protection.

CONCLUSION

For these reasons, the Court should reverse the decision and order of the Supreme Court of the State of Montana.

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Supreme Court, U.S.
FILED
MAR 12 1992
OFFICE OF THE CLERK

No. 91-779

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

BURLINGTON NORTHERN
RAILROAD COMPANY,
Petitioner,

v.

WILLIAM D. FORD,
Respondent.

BURLINGTON NORTHERN
RAILROAD COMPANY,
Petitioner,

v.

THOMAS L. JOHNSON,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MONTANA

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

BURLINGTON NORTHERN
RAILROAD COMPANY,
Petitioner,

v.

WILLIAM D. FORD,
Respondent.

BURLINGTON NORTHERN
RAILROAD COMPANY,
Petitioner,

v.

THOMAS L. JOHNSON,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MONTANA

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a national nonprofit public interest law and policy center with more than 100,000 members throughout the United States.[1] WLF seeks to promote and protect the free

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[1] This brief is filed with the written consents of the parties which are on file with the Clerk of the Court.

enterprise system and the economic and civil liberties of individuals and businesses. In particular, WLF has devoted substantial resources to combating what it believes to be abusive litigation practices, excessive punitive damage awards, excessive attorneys' fees, and unwarranted expansion of tort liability by publishing monographs and similar materials on the subject and by filing *amicus curiae* briefs in appropriate cases. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991); *Rastelli v. Goodyear Tire & Rubber Co.*, (N.Y., argued Feb. 12, 1992); *Burlington, Vt. v. Dague*, No. 9-810, *cert. granted*, 60 U.S.L.W. 3513 (Jan. 27, 1992).

WLF believes that the discriminatory Montana venue provision in question in this case allows for forum shopping against out-of-state businesses. That forum shopping results in excessive damage awards which contribute to the cost of doing business, a cost ultimately borne by the affected company or its customers. A ruling in favor of the petitioner will not only reaffirm this Court's prior rulings on the issue, but also will contain abusive forum shopping within narrow limits.

SUMMARY OF ARGUMENT

In 1927 the Court established in *Power Manufacturing Co. v. Saunders*, 274 U.S. 490 (1927), that a state is forbidden from using its venue rules as a vehicle for discriminating between domestic corporations and foreign corporations with a fixed place of business and a registered agent in the state. Most state regulations and most state courts have followed that pronouncement. Montana, however, has created a venue scheme that discriminates in precisely the manner proscribed by the Court 65 years ago.

Montana creates two classes of defendants: residents and nonresidents. Its residents can only be sued in their

county of residence or where the tort occurred. More liberal venue -- indeed, a totally permissive, statewide venue -- is granted plaintiffs suing nonresidents, which includes all out-of-state corporations. Montana offers no rational basis for such a distinction.

Accordingly, resolution of this case does not require a radical departure from precedent, or even a significant step in the development of equal protection analysis. It requires only a reaffirmation of the Court's established precedent.

The second-class treatment afforded to out-of-state corporations results in a distortion of the judicial system. The "foreigner" -- the out-of-state corporation -- is subjected to higher litigation costs because it can be sued in counties remote from its principal place of business in Montana. The out-of-state corporation also becomes an easy target for higher jury verdicts, since it can be dragged into plaintiff-oriented venues from which domestic corporations are insulated. These excessive costs are ultimately passed on to consumers across the nation in the form of higher costs. Plaintiffs suing in Montana obtain an undue advantage at the expense of out-of-state corporations and the public. This distortion can be corrected by the Court's declaration that Montana's venue statute is unconstitutional.

ARGUMENT

I. MONTANA'S VENUE STATUTE DISCRIMINATES BETWEEN OUT-OF-STATE CORPORATIONS AND IN-STATE CORPORATIONS WITHOUT ANY RATIONAL BASIS FOR SUCH DISCRIMINATION

The Montana venue statute, Mont. Code Ann. § 25-2-118 (1989) ("MCA"), protects in-state corporate defendants from lawsuits in any county other than "the county in which the defendants or any of them reside at the commencement of the action." In contrast, Montana requires

an out-of-state corporation to defend lawsuits brought in any "county the plaintiff designates in the complaint." *Id.* The Montana legislature and courts have offered no rational basis to support this distinction, and none exists.

A. Montana's Venue Provisions Irrationally Disadvantage Out-of-State Corporations

Although there is little legislative history with which to explain this disparity of treatment, it appears to stem from the outdated concept, prevalent at the time of passage of Montana's venue statute, that out-of-state corporations were considered to have no legal existence beyond their state of incorporation, and could not be reached outside that state's boundaries. *See St. Clair v. Cox*, 106 U.S. 350, 354 (1882). Subsequent decisions by this Court, however, supported attempts by states to place out-of-state corporations on the same footing as local corporations. For example, the Court upheld state requirements that all nonresident corporations and domestic corporations that had their principal office out of state appoint the state auditor as its agent for service of process, *St. Mary's Franco-Am. Petroleum Co. v. West Virginia*, 203 U.S. 183 (1906), and the requirement that all foreign corporations file a copy of their corporate charters with the state in order to gain access to the courts of the state, *Interstate Amusement Co. v. Albert*, 239 U.S. 560 (1916), or other requirements that were not considered "arbitrary and unreasonable terms." *Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Washington Superior Court*, 289 U.S. 361, 365 (1933) (citing *Saunders*).

In addition to distinguishing between resident and nonresident corporations for venue purposes, Montana forbids an out-of-state corporation from acquiring residence for venue purposes.[2] Thus, regardless of whether a

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[2] *Foley v. General Motors Corp.*, 159 Mont. 469, 499 P.2d 774 (1972); *Truck Ins. Exch. v. Nat'l Farmers Union Property & Casualty*

(continued...)

foreign corporation has established a fixed place of business in the state or has designated an agent for receipt of service, it cannot obtain resident status in Montana. *See id.*

This unyielding distinction between resident and nonresident corporations for purposes of venue determination is coupled with what the Montana courts candidly describe as an "open door" policy.[3] This policy permits plaintiffs residing outside Montana to use the Montana courts as a forum to sue non-Montana defendants, even when the injury occurred elsewhere.[4]

Consequently, an out-of-state corporation can be sued in any one of the 56 counties in Montana. An out-of-state corporation may be sued there: by an in-state plaintiff whose injury occurred in another Montana county; by an in-state plaintiff whose injury occurred in another state; by an out-of-state plaintiff with an in-state injury; or by an out-of-state plaintiff with an out-of-state injury. The scope of venue in Montana is unlimited even if all plaintiffs, all defendants, all legal counsel, or even all witnesses are located out-of-state. The alteration of one element, however -- so that the defendant is an in-state corporation --

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[2] (...continued)
Co., 149 Mont. 387, 427 P.2d 50 (1967); *Hanlon v. Great N. Ry.*, 83 Mont. 15, 268 P. 547 (1928).

[3] *See, e.g., Haug v. Burlington N. R.R.*, 236 Mont. 368, 770 P.2d 517, 521 (1989); *State ex rel. Burlington N. R.R. v. Eighth Judicial Dist. Court*, 229 Mont. 325, 746 P.2d 1077 (1987).

[4] The imposition on out-of-state railroads is exacerbated by the fact that the Montana legislature has also eliminated the doctrine of *forum non conveniens* for defendants in actions filed under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988) ("FELA"). MCA § 25-2-201 (1989); *see Haug v. Burlington N. R.R.*, 770 P.2d at 521. Thus, FELA plaintiffs from all over the northwest are invited to select a favorable Montana county in which to sue railroads, such as Burlington Northern, leaving the railroads with no means of effectively objecting to a blatantly inappropriate or inconvenient forum.

changes the venue requirements for all of the above examples. If the defendant is an in-state corporation, the plaintiff may *only* bring the action in the county where the corporation resides or where the injury occurred. MCA 25-2-118; 25-2-122 (1989); *see also Siefert v. Gehle*, 133 Mont. 320, 323 P.2d 269 (1958).

This disparity of treatment protects all in-state corporations from the state-wide forum shopping imposed on out-of-state defendants. The nonresident corporation is thus denied equal protection from statewide forum shopping afforded to all in-state corporations.[5]

B. The Discrimination in Venue Invites Forum Shopping Against Out-of-State Corporations

The impact of liberal venue provisions on the nonresident corporation should not be underestimated. Many trial lawyers consider venue critical to the outcome of litigation.[6] It often will determine: who the judge will be and the degree of judicial tolerance that will be exercised, who the jury will be and how sympathetic they are to a particular defendant, the relative burden and expense of the litigation,[7] the evidence that may be admitted, and the length of

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[5] The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

[6] *E.g.*, Marvin M. Salenger, *Litigation & Administrative Practice Course Handbook Series Litigation: The Management and Trial of a Medical Malpractice Case* (1990); 3 Am. Jur. *Trials* § 22 (1965); Stacy Adler, *Forum Can be Deciding Factor in Coverage Suits*, Business Insurance, Nov. 21, 1988, at 82.

[7] Allan R. Stein, *Erie and Court Access*, 100 Yale L. J. 1935, 1938 (1991). Stein concludes that choice of venue "decisions thus can have

(continued...)

delay until trial.[8] In sum, venue "may decide the outcome of the case."[9]

Forum shopping is widely recognized as a significant litigation weapon.[10] One commentator has suggested that it could be tantamount to malpractice in some cases if "proper" forum shopping is not pursued. Juenger, 63 Tulane L. Rev. at 572. It is also recognized as a virtual win or lose proposition in certain types of cases, such as environmental insurance coverage cases.[11]

The evolution of statutory and decisional law with respect to venue, however, has limited abuse of this weapon. Juenger, 63 Tul. L. Rev. at 556-57. Forum shopping among federal courts is limited on two fronts. This Court's decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), drastically curtailed the practice of forum shopping that developed in the wake of *Swift v. Tyson*, 41 U.S. (61 Pet.) 1 (1842). By establishing that federal

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[7] (...continued)
enormous impact on the litigants even though they may not necessarily affect the underlying claim." *Id.*

[8] BNA, *Civil Trial Manual Practice Series* 21:241 (1987).

[9] *Id.*

[10] Forum shopping is defined as a tool used by plaintiffs to gain a pre-litigation advantage over a defendant. *Black's Law Dictionary* 655 (6th ed. 1990); *see also* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 Tul. L. Rev. 553, 573 (1989) ("The plaintiff usually shops in the forum with which he is most familiar or in which he gains the greatest procedural advantage or puts the defendant to the greatest procedural disadvantage") (quoting Collins, *Contractual Obligations -- The EEC Preliminary Draft Convention on Private International Law*, 25 Int'l & Comp. L.Q. 35, 36 (1976)).

[11] *See* Peter J. Kalis & Thomas M. Rieter, *Examining Choice-of-Law and Choice-of-Forum Issues Before Litigating Environmental Insurance coverage*, 2 Envtl. Claims J. 165 (1989-90); Adler, Business Insurance, at 82 ("choice of forum 'is where most of the shooting is going on'") (quoting insurance coverage attorney Peter Kalis).

courts must apply state substantive law to cases brought under diversity jurisdiction, *Erie* required application of the same law to all persons, regardless of their citizenship, and thus eliminated most of the incentives for forum shopping in federal courts. Moreover, the federal transfer provisions reduce the harassment value of forum shopping in federal courts. A federal court may transfer an action from one district court to another, for the convenience of the parties, even when venue was proper in the first court. 28 U.S.C. § 1404 (1988).

Erie, however, did not affect state-to-state forum shopping. Forum shopping abuse by litigants choosing among states continues, but is limited by state venue rules and forum non conveniens principles. Montana, however, does not have such a restraint. Its "open door" policy encourages state-to-state forum shopping. *See* note 3, *supra*.

Montana, not satisfied with its "open door" policy, however, also offers plaintiffs the "any county" option, which encourages county-to-county forum shopping. Montana's statute operates to discriminate in this manner, however, only against out-of-state corporations -- those with no vote or voice in its legislative enactments.

In-state forum shopping is recognized as frequently determinative of verdicts in areas of contingency fee driven litigation. Juenger, 63 Tul. L. Rev. at 556 ("Especially in tort cases, venue often determines the size of a verdict because the generosity of juries varies from one location to another"). It is natural, therefore, that lawyers will migrate toward courts that produce the highest verdicts and have the least demanding procedural rules, "the most lopsidedly pro-plaintiff procedural rules, the laxest scrutiny of attorney's fees." Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* 82 (1991).

Yet the Montana legislature and courts have not attempted to provide a rational basis for inflicting this

forum shopping solely on out-of-state corporations. Especially in the case of foreign corporations that have registered to do business in the state or appointed an agent for purposes of service of process,[12] such discrimination is not only unwarranted, but unconstitutional.

The Court's decision in *Power Manufacturing Co. v. Saunders*, 274 U.S. 490 (1927), established that states may not discriminate with respect to venue between resident corporations and nonresident corporations that have a registered agent and a fixed place of business in the state. In *Saunders*, the Court confronted facts remarkably similar to those in the pending case. The Arkansas venue provision allowed suit against a nonresident to be brought in any county, while strictly limiting the possible choices of venue against residents. 274 U.S. 492-93. Like Burlington Northern, the defendant in *Saunders* was incorporated and had its headquarters out of state, but had a fixed place of business in the state and a designated agent for service of process. When the plaintiff in *Saunders* was injured at the defendant's place of business in Arkansas, he brought suit in a county with no connection to the lawsuit. Striking down the Arkansas venue statute as violative of the Equal Protection Clause of the Fourteenth Amendment, the Court observed: "[t]here is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person." *Id.* at 494. Application of established precedent requires invalidation of the Montana venue statute on the same grounds.[13]

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[12] All but seven states have adopted provisions modeled after the Model Business Code's section 15.07 requiring nonresident corporations to maintain a registered or principal office and a registered agent in the state. The remaining seven jurisdictions require some sort of designated office or agent for service of process as well. Model Bus. Corp. Act Ann. § 15.07 (1991 Supp.).

[13] Indeed, many other states have declared their own venue schemes unconstitutional on the basis of *Saunders*, or revised their venue rules

(continued...)

II. MONTANA'S DISCRIMINATORY VENUE PROVISIONS IMPOSE INEQUITABLE COSTS ON OUT-OF-STATE CORPORATIONS AND DISTORT TORT LIABILITY COMPENSATION PRINCIPLES

Forum shopping exploits disparities in the rights of parties litigating identical claims in different states or even different counties. This litigation technique raises costs to litigants and the courts. Under Montana's venue statute, however, which discriminates only against out-of-state defendants, the costs are generally imposed outside of Montana.

The effects of Montana's venue statute, as applied, are invidious. The imposition of statewide forum shopping establishes an environment conducive to the infliction of parochial prejudices against out-of-state corporations. If a defendant happens to be a distant large corporation, sued in a county remote from its principal place of business in Montana, local juries possess little incentive to deny a plaintiff an unjustifiably high recovery.

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[13] (...continued)
or interpretations of residency in order to conform to the *Saunders* standard. *See Philco-Ford Corp. v. Holland*, 548 S.W.2d 828, 829 (Ark. 1977); *Banning v. Minidoka Irrig. Dist.*, 406 P.2d 802 (Idaho 1965); *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (Mo. 1962); *Commercial Carriers, Inc. v. Matracia*, 311 S.W.2d 565 (Ky. 1958); *Hale v. Bohannon*, 241 P.2d 4 (Cal. 1952) (*en banc*); *Smith v. Utah Home Fire Ins. Co.*, 47 N.W.2d 785 (Minn. 1951); *Hill v. Atlantic Greyhound Corp.*, 51 S.E.2d 183 (N.C. 1949); *Forman v. Mississippi Publishers Corp.*, 14 So. 2d 344 (Miss. 1943); *Hirsch v. Shepherd Lumber Corp.*, 20 S.E.2d 575 (Ga. 1942); *Windham v. Pace*, 6 S.E.2d 270 (S.C. 1939); *Henry Fisher Packing Co. v. Mattox*, 90 S.W.2d 70 (Ky. 1936); *see also* Me. Rev. Stat. Ann. tit. 4, § 155 (West 1989); Neb. Rev. Stat. § 25-403.02 (1989); Or. Rev. Stat. § 14.080 (1989); Ala. Const. Art. XII, § 232 (achieving the same result by constitutional amendment).

The tendency to award inflated damages from out-of-state companies to injured plaintiffs persists unchecked by local economic concerns. A jury in a small community will tend to avoid bringing a particularly harsh result upon its own residents or businesses.[14] No apparent harms will be visited upon local residents, however, from assessing exorbitant rewards against out-of-state defendants.

Venue provisions that attract large jury verdict litigation solely against out-of-state corporations allow any resulting harms from such litigation to fall on distant and virtually anonymous businesses. The state suffers little or no harm in the form of loss of jobs, loss of industry, or loss of tax base from the award of high money verdicts. To the extent economic consequences are ultimately experienced at the out-of-state corporation's operations in the state, they are felt in another county, most likely where the principal place of business in the state is located.

It has long been recognized that "litigation instituted in an inappropriate forum . . . proceeds deliberately from a desire to sue where verdicts are largest . . . " Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1, 34 (1929). As one commentator has suggested:

> The value of getting into the right court is quite tangible. Some years ago an experienced injury lawyer was quoted as saying that injury cases with identical facts could bring expected damage awards ranging from $10,000 to $2,000,000 depending on the jurisdiction in which they were filed. . . . Often an otherwise valueless claim acquires settlement value if it can be brought in a dangerous court district. . . .

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[14] Stephen Susman & Martha Evans, *Prosecuting the Common Law Lender Liability Case*, 468 PLI/Comm. 53 (1988); *see also* Richard Neely, *The Product Liability Mess: How Business Can Be Rescued From the Politics of State Courts* 45 (1988).

Olson, *The Litigation Explosion* 82.

> Even more to the point, the courts that frown on forum-shopping tend to be the ones where no one wants to shop because they protect defendants' rights in other ways too. The courts most apt to favor plaintiffs are likewise the ones inclined to open their doors to all comers. Some, like the fabled New Orleans saloons that never close, have practically taken those doors off the hinges.

Id. at 85-86.

Forum shopping among counties within a state will inexorably lead to several harmful results: (1) it causes the overburdening of certain courts perceived to be "friendly" to the claims brought or to large fee awards;[15] (2) it creates unnecessary expense in the judicial system as plaintiffs file suit in the most favorable court, rather than the simplest or closest;[16] and (3) it creates the perception that some courts are "fairer" than others.[17]

Montana's encouragement of forum shopping by plaintiffs against out-of-state corporations has produced these effects. Most of the FELA litigation is centered in only two counties, Yellowstone and Cascade. As these counties

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[15] *See* Blair, 29 Colum. L. Rev. at 34; *see also* Melody Perkins, *Judges Reduce Civil Trials to Cut Costs*, Great Falls Trib., Mar. 10, 1990 (judges vacating civil trials in Cascade County, Montana, to reduce court budget deficit).

[16] *See, e.g.*, 135 Cong. Rec. E2243 (daily ed. June 21, 1989) (statement of Rep. Luken) ("The losers from [forum shopping] are the American public who end up paying excessive legal fees that are silently encapsulated in the price of products.")

[17] *Hanna v. Plumer*, 380 U.S. 460, 467 (1965); *Erie*, 304 U.S. at 73-74.

achieve recognition as pro-plaintiff havens by the contingency fee bar, additional litigation has followed.

As a result of this regional concentration of litigation in one or two counties, out-of-state corporations will be subjected to higher and higher litigation costs and increased settlement costs because of the unequal treatment under the venue statute. Montana's venue scheme promotes a distortion in the tort liability system by disproportionately burdening out-of-state corporations with these costs.

Such discrimination against out-of-state corporations can be freely waged because, as nonresidents, these defendant corporations lack domestic political clout. They lack any significant voice in the state legislative processes. Elected public officials, state legislators, and state court judges possess a political self-interest in protecting in-state residents. Justice Neely of the West Virginia Supreme Court of Appeals refers to this as "an exercise in economic self-defense."[18] He further discusses this point in his book:

> The problem is entirely political: the logic of collective action implies that no one state or group of states will undertake to act responsibly to curtail off-line wealth redistribution, given the irresponsibility on the part of neighboring states. . . . As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.

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[18] Testimony of Justice Richard Neely at 8, *in* Hearings on S. 640 Before the Senate Commerce Committee, 102d Cong., 1st Sess. (Sept. 12, 1991).

Richard Neely, *The Product Liability Mess*, at 4. Justice Neely explains the political dynamics of state court systems in which judges are elected: large verdicts are awarded in favor of local plaintiffs against out-of-state corporate defendants; the local plaintiffs' lawyers take their one-third contingency fees from the jury awards; the lawyers contribute part of their income to the re-election campaigns of the state trial judges; more cases are brought on behalf of more plaintiffs before the same judges, and the cycle continues. *See id.* at 24-25, 62-63 (relating fundraising process to the behavior of state court judges). This process all depends, of course, on the first step. The opportunity to rule against outsiders allows state officials to "redistribute money from people who live in other states to their own constituents." Olson, *The Litigation Explosion* at 87.

The costs of the local largesse afforded by a venue statute that discriminates against nonresident corporations are borne by those nonresident corporations in the first instance. In many cases, large verdicts are then absorbed by the corporations' liability insurance carriers, often resulting in increased premiums. Eventually, however, those costs are passed on to the consumer in the form of increased prices. The public pays the costs of the Montana permissive venue scheme.

While the plaintiff may "win" by forum shopping, the public "loses." Forum shopping results in congested court calendars, causing other suits to be unnecessarily delayed.[19] Local taxpayers must bear the burden of paying for a judicial system abused by outsiders.[20] Perhaps even more

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[19] *See supra* note 15.

[20] *See id.*

disturbing, forum shopping "'demeans the entire judicial process' of adjudication."[21]

The Montana venue statute subjects only out-of-state corporations to this discriminatory treatment, while shielding its in-state corporations from this same treatment. Legislators possess no incentive for fairness in devising these statutes, so the voice for out-of-state corporations must come from this Court. Furthermore, if this Court sanctions Montana's version of a venue law singling out foreign corporations for wide-open forum shopping, then other states are likely to follow. Whether by legislation or judicial interpretation, these other states will have a powerful incentive to adopt similarly discriminatory venue rules in order to favor their local plaintiffs in cases brought against out-of-state corporations. As Justice Neely demonstrates, state court tort litigation across the nation involves a "race to the bottom." Judges (particularly elected judges), tend to adopt pro-plaintiff legal rules, precisely because such rules redistribute wealth to local residents (constituents in the case of the elected judges) from out-of-state corporations with no local clout. Neely, *The Product Liability Mess*, at 70-72. Once a few states have adopted a particular pro-plaintiff rule, others inevitably follow, in order to ensure their residents an equal share of the litigation pie. *Id.* at 73-75 (drawing analogy to unconstitutional attempts of states to tax interstate commerce). Venue laws that discriminate against foreign corporations are a perfect candidate for this downward spiral. Thus, it is highly likely that if this Court removes *Saunders* as a barrier to such discriminatory laws, multiple states will move to adopt them.

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[21] Yolanda Eleni Stefanou, *Concurrent Jurisdiction Over Federal Civil RICO Claims: Is it Workable? An Analysis of Tafflin v. Levitt*, 64 St. John's L. Rev. 877, 897 (1990) (quoting *Commission on Revision of Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 220 (1975)).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision and order of the Supreme Court of the State of Montana.

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Dated: March 12, 1992

Supreme Court, U.S.
FILED
MAR 12 1992
OFFICE OF THE CLERK

No. 91-779

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

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Respondent.

On Writ of Certiorari to the Supreme Court of the State of Montana

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-779

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

WILLIAM D. FORD,
Respondent.

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

THOMAS L. JOHNSON,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Montana

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Association of American Railroads ("AAR") is a non-profit trade association representing the Nation's major railroads. Its members account for approximately 85 percent of the line haulage, employ 90 percent of the workers, and produce approximately 93 percent of the freight revenues of all railroads in the United States. AAR represents its member railroads and appears in an

amicus capacity before courts, agencies, and the Congress in matters of common interest.

AAR's members operate a national transportation network, with tracks covering approximately one hundred twenty thousand miles in virtually every state in the continental United States.[1] Within each state, each railroad corporation's tracks may touch many different counties or judicial districts. By virtue of this geographically broad inter- and intra-state presence, and because each railroad is a foreign corporation in every state in which it operates (except the state of its incorporation or domicile), the impact on AAR members is particularly harsh when state venue statutes discriminate against out-of-state corporate defendants. One of the major effects of such discrimination is, as demonstrated vividly in this case and in other areas of the United States, a blatant and vigorous strain of forum-shopping. This manipulation of the court system imposes significant additional costs at a time when the litigation explosion is threatening the financial vitality of the railroads, an industry that is facing an increasingly competitive transportation market.[2]

AAR files this brief to emphasize the significance of this issue to the railroad industry. It strongly supports Petitioner's position that the Montana venue statute, which provides that non-resident corporations may be sued in any of the state's fifty-six counties while resident corporations may be sued only in their county of residence, violates the Equal Protection Clause of the Fourteenth Amendment.

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[1] Association of American Railroads, *Railroad Facts* 44 (1991).

[2] In 1990, nearly 8000 lawsuits were filed against railroads under the Federal Employers Liability Act ("FELA"), 45 U.S.C. 51, *et seq.*, the statute under which this case arose. Railroads spent over one billion dollars on FELA payouts and transaction costs in 1990. Association of American Railroads, 1990 Report of Claim and Litigation Experience (1991).

INTRODUCTION AND SUMMARY OF ARGUMENT

In the State of Montana, a non-resident railroad corporation with tracks somewhere in Montana can be sued in any county in Montana by any person, resident or non-resident, even when the event causing the injury did not occur in Montana. In Montana, this gives plaintiffs a choice of fifty-six counties. However, a resident railroad corporation can be sued only in one county[3]—the county of its residence—for exactly the same type of conduct and injury. MCA § 25-2-118.[4]

This discrimination between resident and non-resident corporations, on its face, violates the Fourteenth Amendment's guarantee of equal protection of the laws. Neither the State nor the Montana court has asserted any rational basis to justify the discrimination, and there is no such rational basis. The only basis articulated by the Montana Supreme Court has been that the broad federal venue provisions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, justifies allowing railroad workers greater flexibility in venue decisions than other litigants. However, this rationale fails to justify the Montana statute since that statute does not distinguish railroad corporations from non-railroad corporations, but rather resident corporations from non-resident corporations. Indeed, under the Montana statute, the plaintiff who sues a *resident* railroad is restricted to

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[3] In tort actions, Montana allows a plaintiff a choice of two counties in which to sue a resident defendant: the county where the injury occurred, or the county of residence of the defendant. MCA § 25-2-122. However, in *Haug v. Burlington Northern Railroad Co.*, 770 P.2d 517, 520 (Mont. 1989), the Montana Supreme Court held that "if none of the defendants reside in Montana, a plaintiff may choose any county in the state as the place of trial of a tort action, notwithstanding the alternate choice of venue under § 25-2-122."

[4] The Montana courts have conclusively held that a Montana corporation "resides" in only one place—the county in which it has its principal place of business. *Platt v. Sears, Roebuck & Co.*, 721 P.2d 336, 338 (Mont. 1986).

only one county (or at most, two) rather than being able to choose among the fifty-six counties available to the plaintiff suing a *non-resident* railroad.

The effect of a statute such as Montana's, which deprives non-residents of the protections of the law afforded to residents, is to encourage rampant forum-shopping against non-resident defendants. The two underlying actions in this case were brought against Burlington Northern ("BN") under FELA in state district court in Yellowstone County, Montana. BN, whose tracks pass through twenty-five Montana counties, has its principal place of business in Montana in Hill County and a registered agent in Lewis and Clark County. In each of the underlying cases, the plaintiffs alleged that the injury occurred in Sheridan, Wyoming, not in Montana. Each plaintiff was a resident of Sheridan, Wyoming, not Montana. The defendant, BN, was a non-resident corporation that happened to do business in Montana, as well as in Sheridan, Wyoming. As a result, plaintiffs were able to choose from among fifty-six forums in Montana the forum that would be most favorable to them. Indeed, the only apparent basis for bringing these suits in Yellowstone County was plaintiffs' belief that a Yellowstone County jury would be more sympathetic to plaintiffs or more hostile to defendants than would be other juries. Had BN been a Montana corporation, it could have insisted on venue in Hill County. Because it is a non-resident corporation, it was forced to defend in a county that serves as a magnet for FELA claimants. This disparity, and the resulting forum-shopping against non-resident corporations, are at issue before the Court.

ARGUMENT

Whether states may, consistent with the Equal Protection Clause of the Fourteenth Amendment, deny nonresidents the protection of venue statutes that they offer residents has already been decided by this Court. In *Power Manufacturing Company v. Saunders*, 274 U.S. 490 (1927), this Court considered the question of whether an Arkansas venue statute—virtually identical to the statute at issue in Montana—conflicted with the Equal Protection Clause. That statute required personal injury actions against domestic corporations to be brought in a county where the corporation had a place of business or where its chief officer resided, but allowed the identical actions against foreign corporations to be brought in any county in the state. *Id.* at 491-92. The Court noted,

> It of course rests with the State to prescribe the venue of actions brought in her courts. But the exercise of this power, as of all others, must be in keeping with the limitations which the Constitution of the United States places on state action. Procedural statutes are not excepted, but must fall like others when in conflict with those limitations.

Id. at 495. Holding that the statute plainly discriminated in a substantial way against foreign corporations in favor of domestic corporations, and that there was no substantial difference in the situations of foreign and domestic corporations, nor any rational basis to justify the discrimination, the Court struck the venue provision as unconstitutional.[5] Significantly, the defendants in that case did not assert that they had a fundamental right to

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[5] *Saunders* has not been overruled, and, although later decisions of this Court have questioned its continued vitality, those cases are all distinguishable. For example, in *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 645 (1976), although Justice Brennan noted there was some question regarding *Saunders*, the Court found it unnecessary to consider *Saunders* because it found that the statute before it did not in fact deny comparable discovery to a foreign defendant that it afforded to a domestic defendant.

venue in a particular place, but instead argued only that *if* the state accorded the protections of a venue statute to residents, it could not deny the protections of that statute to non-residents without some legitimate basis for the denial.

This case is identical. The Montana statute discriminates, on its face, against out-of-state defendants. While such discrimination might be countenanced under the Equal Protection Clause if it were based on a rational distinction, no such rational basis has been or could be articulated. Indeed, the Montana Supreme Court specifically declined to address the issue of "whether there is a rational basis for treating all out-of-state corporations differently from all domestic corporations." *Ford v. Burlington Northern Railroad Co.*, No. 90-577, 90-558 (Mont. Sup. Ct. Aug. 12, 1991), *reproduced in* Petition for Writ of Certiorari, *Burlington Northern Railroad Co. v. Ford*, No. 91-779, Appendix at 9a (hereafter "Petition for Certiorari"). Instead, the court focused solely on railroad corporations and held that "it does appear that there is a commonly accepted historic justification for allowing railroad workers greater flexibility when choosing a forum than other litigants." *Id.* Thus, the court relied on the broad federal venue provisions codified in the FELA statute to justify the statutory discrimination between domestic and foreign corporations in the State of Montana.[6]

The Montana court's rationale does not withstand even the most cursory analysis. Because the FELA provision applies only to railroads, it provides no basis for distinguishing between resident and non-resident corporations. It is plain that under the Montana statute, any Montana railroad corporation may be sued only in the county

[6] The FELA venue provisions allow a plaintiff to sue a railroad in *federal* court in the district of residence of the defendant, or where the cause of action arose, or where the defendant is doing business at the time the action is commenced. 45 U.S.C. § 56.

in which it "resides" (or where the tort occurred), while a non-resident railroad may be sued in any of fifty-six counties that the plaintiff chooses. Thus, the statute treats non-resident railroads differently from resident railroads and (except for residence) treats railroad corporations, as a group, just as it treats non-railroad corporations. FELA creates a distinction between railroads and non-railroads; the Montana venue statute's distinction is between residents and non-residents.

This blatant discrimination against non-residents presents a paradigmatic case for equal protection analysis. Determining an appropriate place for trial presents questions of competing interests between putative plaintiffs and putative defendants in the state. Plaintiffs' interests in convenience, accessibility, and expense must be balanced against defendants' interests in the same factors. These questions are resolved, in significant part, through the political processes involved in the passage of any statute. Thus, as between in-state entities, all of which are represented in the legislature, Montana has made clear that it believes providing venue in a single county fairly and appropriately balances those competing interests.

Essentially the same interests of convenience, accessibility, and expense are at issue when a plaintiff sues a non-resident defendant. In assigning venue to out-of-state defendants, who are not part of the Montana political process, however, Montana has reached a fundamentally different—and vastly more prejudicial—conclusion. That conclusion was that the competing interests of plaintiffs and out-of-state defendants were fairly and appropriately balanced by providing venue in any of *fifty-six* counties, rather than one county, regardless of whether defendant, plaintiff, or the action has any relation to the plaintiff's county of choice. This striking disparity has not been and cannot be justified by any legitimate state interest. Instead, it is clearly the political result of balancing the interests of plaintiffs and their counsel, who are part of

the political process, against the interests of non-resident defendants, who are not represented in the political process.[7]

The effect of the facially discriminatory Montana venue statute is to permit plaintiffs who are suing out-of-state corporations to engage in unlimited forum-shopping. Such plaintiffs can choose among fifty-six possible forums to locate the one most likely to be hostile to the defendant or sympathetic to the plaintiff. In contrast, resident corporations are protected from such manipulation of the court system.

This Court and the state courts have demonstrated an historical aversion to the practice of forum-shopping as a violation of equal protection. As this Court held in the landmark case of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), in striking down the doctrine of *Swift v. Tyson*, 10 L.Ed. 865 (1842):

> Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. . . . *Thus, the doctrine rendered impossible equal protection of the law.*

Erie, 304 U.S. at 75 (emphasis added). Plainly, the policy of *Erie* is that for the same transaction, the accident of a suit by a non-resident litigant in federal court instead of state court a block away should not lead to substantially different results.

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[7] Additionally, while the concept of *in personam* jurisdiction may also keep a defendant from being "haled" into a jurisdiction with which he has no connection, *see World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), that protetcion is much diminished when a large corporation operates on a nationwide basis, such that it is "present" for jurisdictional purposes over a large geographical area. Moreover, in Montana, as in most states, once a defendant is "found" within the state, he is subject to jurisdiction anywhere in the state; the personal jurisdiction requirement offers no protection from *intra*-state forum shopping. MCA § 25-20-4B.

Although *Erie* was concerned with forum-shopping between state and federal courts, the same reasons that led the Court to reject the practice in that context have justified concerns about forum-shopping among states, or within a state.[8] "When the plaintiff foregoes the economies afforded by bringing suit at home . . . we may begin to be suspicious about whether the plaintiff has sued elsewhere primarily in order to obtain the application of a particular law and thus whether the plaintiff has attempted to 'buy' a particular result." Morrison, "Death of Conflicts," 29 Vill. L. Rev. 313, 362 (1983-84). Whether a plaintiff seeks the application of a different law, or to force the defendant to litigate in an inconvenient forum known or suspected to be hostile to the defendant, the effect is the same: the plaintiff has attempted to manipulate the system to obtain a particular result. It is this manipulation that has been the focus of the courts' aversion to the practice of forum-shopping.[9]

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[8] *See, e.g., Travelers' Indemnity Co. v. Lake*, 594 A.2d 38 (Del. 1991) (recognizing the dangers of forum-shopping); *President's Co. v. Whistle*, 812 P.2d 1194 (Colo. App. 1991) (upholding trial court's denial of declaratory relief because plaintiffs appeared to be forum-shopping); *United Brotherhood of Carpenters Local Union No. 1846 v. Caldwell*, 552 So. 2d 462 (La. App. 1989) (venue provisions intended to prohibit forum-shopping because legislature never intended "to permit a plaintiff to litigate in any parish of the state so capriciously"); *Besser v. E.R. Squibb & Sons, Inc.*, 539 N.Y.S.2d 734 (1989) (construing borrowing statute to avoid the "evils" of forum-shopping), *aff'd* 552 N.Y.S.2d 923 (1990); *Walters v. Inexco Oil Co.*, 440 So. 2d 268 (Miss. 1983) (noting forum-shopping had been perceived evil for more than fifty years).

[9] Historically, one of the purposes of venue provisions has been to provide some protection for defendants from being forced to litigate in inconvenient places that are completely unconnected with either the parties or the event leading to the lawsuit. At English common law, "venue" originally meant the place from which jurors were summoned to Westminster, where all trials in England took place. Because jurors were chosen for their personal knowledge of the facts of the case, they came from the county in which the land at issue lay, or where the event at issue occurred. Even after

Although it is not incumbent on states to provide this venue protection to defendants, they may not constitutionally provide the protection to residents and deny it to non-residents without some reasonable basis for the distinction. *Saunders*, 274 U.S. 490. As noted above, Montana has not provided, and cannot provide such a basis. Predictably, particularly in the FELA context, this lack of protection has led to dramatic numbers of plaintiffs filing in what are perceived to be "hot spots" of sympathetic juries who will award large sums of damages.[10]

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judges were dispatched to counties or circuits to hold court there, and even after proof by witnesses superseded proof by jurors, English plaintiffs enjoyed essentially free venue and could bring most personal actions in virtually any county or circuit. Blume, "Place of Trial in Civil Cases," 48 U. Chi. L. Rev. 1 (1949). However,

> One of the reasons for the separation of the colonies from England had been threats to drag the colonists from their homes to stand trial at distant places. To the people of 1789, place of trial was a matter of great importance, and without safeguards for defendants a federal system of trial courts would not be acceptable.

Id. at 36-73. Echoing this concern nearly a century and a half later, another commentator noted that "since the plaintiff controls the institution of the suit he might behave oppressively toward the defendant unless restrained." Sunderland, "The Provisions Relating to Trial Practice in the New Illinois Civil Practice Act," 1 U. Chi. L. Rev. 188, 192 (1933).

[10] While railroads are covered by the tort-based FELA, virtually all other employers are covered by no-fault workers' compensation laws. Generally, under workers' compensation, a claim can only be brought in a forum that has a significant connection to the claim: for example, where the injury occurred or where the employment relationship was located. A. Larson, *Workmen's Compensation Law*, §§ 86.10, 86.34. In contrast, FELA claimants have much broader latitude in their choice of where to lay a claim. *See* note 6 *supra*. For that reason, among defendants, railroads are particularly vulnerable to forum-shopping. While it is not within the province of this Court to address directly the federal forum-shopping that results from FELA's broad venue provisions applicable in the federal courts, when forum-shopping is exacerbated by a clearly unconstitutional state venue provision, this Court must act.

AAR does not track FELA cases by counties within the different states and therefore has no hard data regarding cases filed in Montana by non-resident plaintiffs who allege no injury in Montana. Nevertheless, it is clear that plaintiffs bringing cases in Montana have the broadest possible choice of forums. Evidence offered by Petitioner Burlington Northern illustrates the extent of forum-shopping within Montana. *See* Petition for Certiorari at 14-17. And, as demonstrated below, empirical evidence from other states suggests that when FELA plaintiffs have this kind of broad venue choice, they commonly engage in forum-shopping on a massive scale.

There can be no question that many FELA plaintiffs and their lawyers believe that certain jurisdictions are "hot spots" of jury sympathy. The number of cases pursued by plaintiffs in these jurisdictions vastly exceeds the number of cases that are connected in any way to these jurisdictions.

One example of such a "hot spot" is Brooke County, West Virginia. The relevant venue statute there, which is quite similar to the Montana statute, provides that when the defendant is a corporation whose principal place of business is not in West Virginia, and whose chief officer does not reside in West Virginia, venue is appropriate where the corporation "does business." W. Va. Code § 56-1-1(a)(2).[11] Venue for a resident defendant corporation, however, is appropriate only where its principal office is located or where its chief officer resides. *Id.* In 1988, 103 plaintiffs had filed FELA actions against Norfolk and Western Railway Company ("N&W") in the Circuit Court of Brooke County, West Virginia. N&W's only connection to Brooke County is that its tracks happen to pass through the county. Of the 103 FELA cases

[11] Significantly, this venue statute, which has itself led to substantial forum-shopping, is even *narrower* than Montana's because Montana does not require an action to be brought where the defendant does business.

filed against N&W in Brooke County, nearly 60 percent (60 cases) were brought by non-residents of West Virginia. Of the 43 plaintiffs that were residents of West Virginia, none were residents of Brooke County. Similarly, none of the injuries claimed in the 103 cases were alleged to have occurred in Brooke County. *Gardner v. Norfolk & Western Ry. Co.*, 372 S.E.2d 786 (W. Va.), *cert. denied*, 489 U.S. 1016 (1988). As was the case with the BN in Montana, had the N&W been an in-state corporation, these cases could not have been brought in the presumably pro-plaintiff Brooke County.

Between 1988 and 1990, after the *Gardner* court held that the doctrine of *forum non conveniens* would not be applied in West Virginia to FELA actions, an additional 818 FELA cases were filed in the Circuit Court of Brooke County. Of those 818 cases, 75 percent (or 644 cases) were filed by non-residents of West Virginia. *Norfolk & Western Railway Co. v. Tsapis*, 400 S.E.2d 239 (W. Va. 1990).[12] As the West Virginia experience demonstrates, states that have venue statutes like Montana's all hold the potential for forum-shopping aimed at non-resident defendants.

Another "hot spot" for FELA litigation is the city of St. Louis, Missouri. The relevant Missouri venue provision allows plaintiffs to sue railroads in the county where the cause of action occurred, in any county in which a defendant owns, operates or controls a railroad, or in any county in which defendant keeps an office or agent. Mo. Rev. Stat. 508.040. Although, unlike Montana, Missouri does not discriminate between resident and non-resident railroads, and thus raises no equal protection problems, its broad venue statute applicable to all railroads and its history of heavy concentration of FELA cases in one

[12] In 1990, noting the tremendous increase in cases filed, the Supreme Court of West Virginia reversed its position and held that the doctrine of *forum non conveniens* was available in West Virginia in FELA actions. *Tsapis*, 400 S.E.2d 239.

county makes it a good example of the degree to which FELA plaintiffs will shop for the most attractive forum if given the opportunity.

Data compiled by several of the member railroads of AAR demonstrate the degree to which St. Louis has become a magnet for FELA plaintiffs from a broad spectrum of states, regardless of the connection of the plaintiff or the case to St. Louis. For example, of the 528 FELA cases filed against the Union Pacific Railroad in all Missouri state courts between 1986 and 1991, 90 percent (474 cases) were filed in the St. Louis Circuit.[13] Of those 474, 252 (54 percent) were filed by plaintiffs who were not residents of Missouri and who alleged injuries occurring outside the state of Missouri.[14] These plaintiffs who alleged no injury occurring anywhere in Missouri and who came to sue Union Pacific in St. Louis resided in states as far-removed as New York, Colorado, Utah, Texas, Nebraska, and Louisiana, as well as in states closer to Missouri such as Iowa, Arkansas, Kansas, Illinois, Oklahoma and Tennessee.[15] Union Pacific's principal place of business is located outside the state of Missouri.

In the same circuit, Norfolk and Western Railroad Co. has also experienced a crush of FELA litigation. Of the 105 FELA cases pending against Norfolk & Western on Sept. 15, 1991 in St. Louis Circuit, 45 were filed by nonresidents alleging out-of-state injuries.[16] Only 6 of the

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[13] *FELA Cases Filed Against Union Pacific Railroad Company In Missouri State Courts 1986-1991.* The data cited by *amicus* in the following several pages relating to cases filed in St. Louis, Missouri is voluminous, and is not reproduced with this brief. All the data referred to are available from files at AAR offices in Washington, D.C.

[14] *Id.*

[15] *Id.*

[16] *Summary of Data on FELA Cases Pending in St. Louis Circuit Court on October 1 (or Sept. 15, 1991).*

105 were brought by St. Louis residents, and only 11 plaintiffs alleged injury in St. Louis.[17] Similarly, of the 40 cases pending in the St. Louis Circuit against St. Louis Southwestern-Southern Pacific Railroad, 77 percent (31 cases) were brought by non-residents alleging injuries occurring out of the state.[18] No cases brought in that circuit against St. Louis Southwestern-Southern Pacific were brought by residents of St. Louis, and no cases alleged any injury occurring in St. Louis.[19] Both railroads' principal places of business are located outside Missouri.

Finally, Burlington Northern has also undergone an onslaught of FELA litigation in St. Louis brought by non-resident plaintiffs alleging no injury in St. Louis. Thus, out of 212 FELA cases pending against it in the St. Louis Circuit Court on September 15, 1991, 102 cases were actions by non-Missouri residents alleging injuries occurring outside of Missouri.[20] Only 4 of the 212 cases were brought by St. Louis residents, and only 12 of the 212 involved injuries alleged to have occurred in St. Louis.[21] As with the other railroads, BN's principal place of business is located outside Missouri.

These statistics illustrate only isolated examples of the tremendous problem of forum-shopping in FELA actions filed in state courts. And, the problem is not new. A survey done by AAR in 1981 showed that 60 percent of FELA suits filed in 1981 were filed in only five states. AAR

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[17] *Id.*

[18] *FELA Cases Pending In the Circuit Court of the City of St. Louis as of 10/1/91 Against the St. Louis Southwestern Railway Company and/or the Southern Pacific Transportation Company.*

[19] *Id.*

[20] *F.E.L.A. Lawsuits Pending In St. Louis City Court Against Burlington Northern Railroad As of Sept. 15, 1991.*

[21] *Id.*

1981 FELA Closed Claim Survey, Mar. 1982.[22] While more recent nationwide figures are not available, the examples of St. Louis, Missouri and Brooke County, West Virginia, indicate that the problem is not diminishing. The numbers demonstrate that forum-shopping by plaintiffs is pervasive; the reason for the concentration of FELA actions in particular areas is painfully obvious. In *Ferens v. John Deere Co.*, 494 U.S. 516, 110 S. Ct. 1274, 1282 (1990), this Court took judicial notice of the fact that plaintiffs would be drawn to file in a state with advantageous conditions: "The advantage to Mississippi's personal injury lawyers that resulted from the State's then applicable 6-year statute of limitations has not escaped us: Mississippi's long limitation period no doubt drew plaintiff to the State." However, this Court has also noted that the perception that a jury in one state will give a larger damage award than a jury in another state is *not* a legitimate justification for seeking venue in a forum with no connection to the litigation. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 510 (1947) (granting a *forum non conveniens* motion).

In Montana, the venue provision which denies equal protection to non-resident corporations leads directly to the sort of forum-shopping decried by this Court and the state courts. As noted above, while a state is under no obligation, as a constitutional matter, to provide protection for any defendants through venue statutes, it is not free to provide that protection to residents but deny it to non-residents without some rational basis for doing so. *Saunders*, 274 U.S. 490. Although some states with statutes facially similar to Montana's have taken steps short of changing their statute to mitigate the dangers of forum-shopping produced by such a statute, Montana has not provided even that protection. Thus, numerous state supreme courts have construed their state laws to allow out-of-state corporations to acquire a "residence" for

[22] This Survey is also on file at AAR offices in Washington, D.C.

venue purposes by maintaining a place of business in the state, or by designating an agent for service of process.[23] Instead, Montana has specifically and consistently declined to so construe its own statute. *Haug v. Burlington Northern R. Co.*, 770 P.2d at 519.

Additionally, while a minimum amount of protection might be afforded by application of the doctrine of *forum non conveniens*, the Montana courts have also consistently refused to apply that doctrine in FELA cases.[24] *Haug v. Burlington Northern R. Co.*, 770 P.2d at 519; *LaBella v. Burlington Northern, Inc.*, 595 P.2d 1184 (Mont. 1979).

Since Montana has refused to construe its venue statute in a way that avoids the equal protection violation apparent from the face of the statute, and since nonresident defendants cannot obtain the benefit of the *forum non conveniens* doctrine, defendants are bereft of any protection from the forum-shopping that pervades the FELA filings in the state of Montana.

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[23] *See, e.g., Zolper v. AT&T Info. Sys., Inc.*, 709 S.W.2d 74 (Ark. 1986); *Banning v. Minidoka Irri. Dist.*, 406 P.2d 802 (Idaho 1965); *Hirsch v. Shepherd Lumber Corp.*, 20 S.E.2d 575 (Ga. 1942).

[24] While the *forum non conveniens* doctrine provides some protection for foreign defendants who are denied the protection of the venue statute, the availability of the doctrine does not remove the equal protection problem. The doctrine is applied only on a case by case basis with virtually sole discretion vested in the trial court. *See Gulf Oil*, 330 U.S. at 508. Without some objective assurance that their proper motions will be granted, foreign defendants are still faced with the prospect of litigating in inconvenient, hostile, or far-off forums while resident defendants are not. Additionally, foreign defendants face the added expense of litigating over the *forum non conveniens* motion.

CONCLUSION

Montana has failed to establish any rational basis for its blatant and substantial discrimination between resident and non-resident corporations. Accordingly, this Court should reverse the ruling of the Montana Supreme Court, and hold that the Montana venue statute violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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No. 91-779

FILED
APR 7 1992
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
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BRIEF OF AMICI CURIAE STATES OF MONTANA, NEW MEXICO, NORTH DAKOTA, SOUTH DAKOTA, TEXAS AND WYOMING

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Amici curiae States of Montana, New Mexico, North Dakota, South Dakota, Texas and Wyoming, through their respective Attorneys General, respectfully submit pursuant to S. Ct. R. 37.5 a brief in support of the respondents' position with respect to the validity of Mont. Code Ann. § 25-2-118 (1991), as applied to the instant cases. Amici agree with the respondents' argument that Montana's venue statute is constitutional on its face and does not deny equal protection of the laws to nonresidents of the State. Amici take the position, however, that this Court may decide the case on a narrower ground and need not reach the validity of the statute's broadest application.

INTEREST OF AMICI CURIAE

The legislatures of each of the amici States have established procedures for the conduct of civil litigation in their state courts, including venue statutes which provide differing requirements either for domestic and foreign corporation defendants or for resident and nonresident defendants. Amici have a vital interest in constitutional issues that affect the powers and responsibilities of state governments, particularly with respect to matters governing the conduct of judicial proceedings in state courts.

State legislatures have broad authority in regulating their judicial systems. "It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the finality and effect of their decisions, provided it does not [deprive any person of rights guaranteed by the Constitution], including the equal right to resort to the appropriate courts for redress." *Missouri v. Lewis*, 101 U.S. 22, 30 (1879). States also have broad discretion to fix rules regarding domicile and residence. *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299

(1937). Venue restrictions based on residency of the parties provide a valuable and legitimate tool for regulating the distribution of cases among the courts of the State and serve the State's goal of providing ready access to its courts. Provision of such access is particularly important to a State such as Montana, where the State's constitution requires its courts of justice to "be open to every person, and speedy remedy afforded for every injury of person, property, or character." Mont. Const. art. II, § 16 (1972).

SUMMARY OF ARGUMENT

The broad contention of the petitioner that Montana law governing the place of trial against nonresidents deprives foreign corporations of equal protection of the laws goes well beyond the facts and circumstances of the case before the Court. Because it was sued in a county in which it conducts substantial business activity, Burlington Northern lacks standing to argue that, as applied to a hypothetical nonresident corporation in a county in which it does no business, the statute is unconstitutional. Petitioner asks this Court to engage in premature constitutional interpretation of the statute upon facts not present in the instant case.

This case is confined to the question whether the petitioner has been denied equal protection of the laws by virtue of the fact that it was sued in a county in which it does business when a domestic corporation generally may be sued only in the county of its principal place of business. In view of a State's broad authority to define the structure of its judicial system and to fix the place of trial of civil actions, this distinction must be upheld if supported by any rational basis. A rational basis exists for

the different treatment in order to afford ready access to the courts of the State in suits against foreign corporations subject to a lesser degree of effective control by the State. This concern is particularly legitimate where -- as here -- a foreign corporation need not identify a principal place of business within the State. Unlike the situation addressed by the Court in *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927), the distinction thus addresses valid State concerns and has not resulted in "real and substantial" discriminatory treatment against the petitioner in this case.

Finally, since Congress has expressly sanctioned broad venue options for an injured plaintiff in an action brought under the Federal Employer's Liability Act, 45 U.S.C. §§ 51 to 60, this Court should hesitate to find unconstitutional a State forum-selection provision which honors the plaintiff's choice where that choice has resulted in a suit against the railroad in a county in which it conducts business.

ARGUMENT

I. TO THE EXTENT THE MONTANA VENUE STATUTE PERMITS A FOREIGN CORPORATION OR OTHER NONRESIDENT TO BE SUED IN A COUNTY WITH WHICH IT HAS NO CONTACT, BURLINGTON NORTHERN LACKS STANDING TO CHALLENGE THE PROVISION AS A VIOLATION OF EQUAL PROTECTION OF THE LAWS.

Standing is a threshold question in every federal case, one which this Court will raise on its own initiative if necessary, since its "legitimate exercise of judicial power is confined both by statutes and by Article III of the Constitution." *Asarco, Inc. v. Kadish*, 490 U.S. 605, 611

(1989). This inquiry involves consideration of both constitutional and prudential limitations. "In its constitutional dimension, standing imports justiciability: whether the [petitioner] has made out a 'case or controversy' between [it]self and the [respondent] within the meaning of Art. III." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).[1]

The elements of Article III standing require: first, that the petitioner allege injury that is "distinct and palpable," as opposed to "abstract," "conjectural," or "hypothetical"; second, that the injury be "fairly traceable" to the allegedly unlawful conduct; and third, that the injury likely will be redressed by the requested relief. *See generally Warth*, 422 U.S. at 498-501; *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983); *Allen v. Wright*, 468 U.S. 737, 751 (1984). Concrete injury is required because it "removes from the realm of speculation whether there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221 (1974). This further serves the function of "insuring that [constitutional] adjudication does not take place unnecessarily." *Id.*

Closely aligned with the "concrete injury" requirement is the prudential condition that the petitioner "generally

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[1]A case presents a genuine case or controversy if "valuable legal rights ... will be directly affected to a specific and substantial degree by the decision of the question of law," but not if the parties are "attempting to secure an abstract determination by the Court of the validity of a statute ... or a decision advising what the law would be on an uncertain or hypothetical state of facts[.]" *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U.S. 249, 262 (1933).

must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. Prudential limitations, though related to Article III concerns, are "essentially matters of judicial self-governance" by which the Court will decline to resolve needlessly a constitutional issue.[2] The rationale for allowing a party to assert only its own rights is twofold. "The limitation 'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy,' *United States v. Raines*, 362 U.S. [17], at 22 [1960], and it assures the court that the issues before it will be concrete and sharply presented." *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984).

In *Raines*, repeating the longstanding caution that scrutiny of statutes for constitutional validity is "'the gravest and most delicate duty that this Court is called on to perform,'" (quoting *Marbury v. Madison*, 1 Cranch 137, 177-80 (1803)), the Court emphasized:

> This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except

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[2]Other prudential limitations include the requirements that the petitioner must allege injury that is more than a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens," *Warth*, 422 U.S. at 499, and to allege an interest that is arguably within the zone of interests protected or regulated by the constitutional guarantee in question. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982).

> as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." ... Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.

362 U.S. at 21 (citations omitted). *Accord Burch v. Louisiana*, 441 U.S. 130, 132 n.4 (1979).

Petitioner Burlington Northern ("BN") broadly contends that Mont. Code Ann. § 25-2-118 (1991), is unconstitutional on its face because it permits BN to be sued in any of Montana's 56 counties, regardless of the relationship of the county to the action or to either of the parties. (Petitioner's Brief at 3-4, 37-38.) Here, however, BN was not sued in a county with which it has no ties. It was sued in Yellowstone County, a venue in which BN admittedly conducts substantial business activity and maintains offices and trackage.[3] Consequently, the arguments presented both by BN and by amici in petitioner's support, raising the specter of plaintiffs from all corners of the nation flocking to Montana to reap

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[3]According to the Montana Supreme Court's opinion below, BN "does not deny that it does business in Yellowstone County, Montana." (Pet. App. at 4a.)

large rewards from helpless multistate corporations, mischaracterize the facts and invite resolution of this case on a basis divorced from its actual circumstances.

In practical effect, therefore, BN asks the Court to determine the constitutionality of Montana's venue statute on a purely hypothetical set of facts. Since the action was brought in a county in which BN conducts significant activity, the question before the Court is in reality whether it is reasonable to subject a foreign railroad corporation to suit in a county in which it conducts business, even though a domestic corporation may be sued only in the county of its principal place of business. BN lacks standing, both for want of a "concrete injury" and for failure to assert its own rights, to challenge the statute on the ground that it might be applied "to other persons or other situations in which its application might be unconstitutional." *Raines*, 362 U.S. at 21. Amici States accordingly suggest that the statute be examined in light of the particular circumstances involved in the case before the Court, and that the broader issue be left for another day.

II. SUBJECTING A FOREIGN RAILROAD CORPORATION TO SUIT IN A COUNTY IN WHICH IT CONDUCTS BUSINESS COMPORTS WITH EQUAL PROTECTION STANDARDS.

The Fourteenth Amendment accords the States wide latitude in enacting laws which affect some groups of citizens differently than others. "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *McGowan*

v. State of Maryland, 366 U.S. 420, 425-26 (1961). The States' substantial sovereign authority under our constitutional system is defined through the structure of their governments. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2400 (1991). "[W]hile the Equal Protection Clause provides a check on such state authority, '[this Court's] scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives.'" *Id.* at 2402 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973)).

Among its constitutional prerogatives is a State's power to define the structure and authority of its judicial system. *Missouri v. Lewis*, *supra*. State legislatures have broad discretion to fix the venue or place of trial of civil actions. "[I]f the protection of fundamental rights by equal laws equally administered is enjoyed, the Constitution does not forbid allowing one person to seek a forum from which another in the same class is excluded." *Bain Peanut Co. of Texas v. Pinson*, 282 U.S. 499, 501 (1931). As recently as 1976, this Court reaffirmed that "'[i]t is fundamental rights which the 14th Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights. ... It is not under any view the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail.'" *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 644-45 (1976) (quoting *Cincinnati Street R. Co. v. Snell*, 193 U.S. 30, 36-37 (1904)).

Nonetheless, a State may not impose unconstitutional conditions on the grant of a privilege to conduct business within the State. *Western & Southern Life Ins. Co. v. State*

Board of Equalization, 451 U.S. 648, 657-58 (1981). Thus, it is well established that,

> whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose.

Id. at 667-68. The test to determine whether a state purpose is legitimate is "whether it addresses valid state concerns." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 895 (1985) (O'Connor, J., dissenting). In examining the legislation as applied to this case, therefore, the Court's inquiry focuses on two questions: "(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?" *Western & Southern*, 451 U.S. at 668. Under this analysis, an equal protection challenge will not prevail as long as, given the reasons put forth in support of the classification, "'the question is at least debatable.'" *Id.* at 674 (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)).

This Court has not hesitated to uphold against equal protection challenge state procedural statutes which have the effect of treating foreign and domestic corporations unequally, so long as the dissimilar treatment is supported by a rational basis. Thus, where New Jersey law permitted the tolling of a statute of limitation against a foreign corporation which had no representative in the state, the Court rejected an equal protection challenge

based on the "reasonable assumption that unrepresented foreign corporations, as a general rule, may not be so easy to find and serve." *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 410 (1982). Likewise, the Court upheld a statutory period of limitations imposed against foreign but not domestic insurance companies, concluding that the State was not prohibited from making any distinction between the two in the length of time within which suit must be brought. *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 585 (1935). "It was competent for the Legislature to determine whether such differences exist, and upon the basis of those differences, and in the exercise of a legislative judgment, to make choice of the method of guarding against the evil aimed at." *Id.* at 586. *See also Hughes v. Alexandria Scrap Corporation*, 426 U.S. 794, 811-14 (1976) (state law prescribing different documentation requirements for foreign scrap processors not violative of Equal Protection Clause where related to the basic statutory purpose of clearing state's landscape of abandoned automobiles); *State ex rel. Bond & Goodwin & Tucker v. Superior Court*, 289 U.S. 361, 366 (1933) (difference in method of prescribing how substituted service should be accomplished on corporation after withdrawal acceptable under Equal Protection Clause).

In 1927, this Court held that a foreign corporation had been denied equal protection of the laws when it was sued outside the only county in the State of Arkansas in which it did any business, where Arkansas law provided a narrower range of permissible venue for suits against domestic corporations. *Power Mfg. Co. v. Saunders*, *supra*. Although the Court has stated that *Saunders* is of questionable vitality, *Starnes*, 425 U.S. at 645, n.6, this case does not require that question to be decided. Quite simply, this is not a *Saunders* case.

Since the Court's decision in *Saunders*, a number of courts have rejected equal protection challenges in cases involving different venue requirements for different entities. Thus, the Court of Civil Appeals of Texas found no equal protection violation where a foreign corporation was sued in a Texas county in which it had an agent, a representative and an office, despite the fact that state law afforded wider venue for foreign corporations than for domestic corporations. *Commercial Insurance Co. v. Adams*, 366 S.W.2d 801 (Tex. Civ. App.), *aff'd*, 369 S.W.2d 927 (1963). Distinguishing *Saunders* on its facts and concluding that it had been "weakened" by subsequent decisions, the court found that "[t]he degree of effective control which the state may exercise over domestic corporations as opposed to foreign corporations in general justifies the classification adopted by the state legislature." 366 S.W.2d at 808. *Accord Coastal States Gas Producing Co. v. City of McAllen*, 540 S.W.2d 808 (Tex. Civ. App. 1976) (citing *Starnes*).

A like conclusion was reached in *Aetna Finance Co. v. Gutierrez*, 632 P.2d 1176 (N.M. 1981), in which the court held that a foreign corporation was not entitled to lay venue in the county of its principal place of business, despite the fact that a domestic corporation would have been entitled to do so. Citing *Starnes* and distinguishing *Saunders*, the court held that Aetna -- although it had no county of "residence" under New Mexico law -- suffered no "real and substantial" discrimination under the venue provision since it in fact maintained an office in the county where the defendants resided and where the contract was made. Its "fundamental right to access" to the courts of New Mexico was thus "fully protected." *Id.* at 1180. *See also Hercules Powder Co. v. Tyrone*, 124 So. 74, 77 (Miss. 1929); *Clark v. Louisville & N. R. Co.*, 130 So. 302, 307-08 (Miss. 1930); *Phillips Petroleum Co. v.*

Smith, 61 P.2d 184, 186 (Okla. 1936); *Wilson & Co., Inc. v. Hickey*, 97 P.2d 564, 565-66 (Okla. 1939); *American International Hospital v. Chicago Tribune Co.*, 458 N.E.2d 1305, 1309-10 (Ill. Ct. App. 1983).[4]

Citing *Starnes* and *Snell*, the United States Court of Appeals for the Ninth Circuit upheld a California statute that permitted a political subdivision to bring an action for eminent domain against a public utility before the California Public Utility Commission, even though eminent domain actions against other persons or entities were required to be maintained in the California Superior Court. *Jackson Water Works v. Public Utilities Commission*, 793 F.2d 1090 (9th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987). Reasoning that an equal protection violation requires the complaining party to demonstrate discrimination "of some substance," the court concluded that "[t]he forum selection results in no ascertainable injury since the same substantive law is applied." 793 F.2d at 1094, 1096. The court found that the State legislature "could have rationally concluded that the public's interest would be better served by allowing the City to select the forum." *Id.* at 1096.

Although the statutes considered in the foregoing cases were drawn differently and applied to different circumstances, the decisions are in harmony with precedent of this Court establishing that a state statute will be upheld against an equal protection challenge so long as it is supported by valid state concerns. "[A]

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[4]*Contra State ex rel. Twin City & Southern Bus Co. v. District Court*, 225 N.W. 915 (Minn. 1929); *Banning v. Minidoka Irrigation District*, 406 P.2d 802 (Idaho 1965); *Pintlar Corp. v. Bunker Ltd. Partnership*, 786 P.2d 543, 546 (Idaho 1990); *Philco-Ford Corp. v. Holland*, 548 S.W.2d 828 (Ark. 1977).

statutory classification impinging upon no fundamental interest, ... need not be drawn so as to fit with precision the legitimate purposes animating it." *Hughes*, 426 U.S. at 813. Applying the imprecise strictures of the Fourteenth Amendment, the courts in these decisions ultimately examined the actual discriminatory impact to determine whether an equal protection violation had been established. In like manner, examination of the circumstances under which Montana's venue statute has been applied in this case reveals no impermissibly discriminatory impact against BN.

In the first instance, subjecting a foreign corporation to suit in a county in which it does business promotes the legitimate State policy to make its courts accessible to injured persons and to hold accountable a corporation which avails itself of the privilege of doing business in the State. Second, allowing a wider venue for suits against a foreign corporation than that allowed for suits against a domestic corporation does not constitute impermissible discrimination against the foreign corporation. To the extent that BN is treated differently in this case, the statute has a rational basis.

> "The degree of effective control which the state may exercise over domestic corporations as opposed to foreign corporations in general justifies the classification adopted by the state legislature. The state policy in this respect is not so arbitrary as to be unconstitutional. As regards foreign corporations submitting to a certain degree of control by qualifying to do business in the state, the justification is less evident, but nevertheless the state is not able to give its citizens the same assurance of effective redress for injuries committed by foreign corporations as it can in the case of domestic corporations."

Stames, 425 U.S. at 647 (Burger, C.J., concurring) (quoting *Commercial Ins. Co. v. Adams*, *supra*, 366 S.W.2d at 808-09).

Montana law evinces a legitimate and real reason for permitting broader venue against foreign corporations than against domestic corporations.[5] Under Montana statutes, a foreign corporation is required to obtain a certificate of authority to conduct business from the Secretary of State.[6] Although the corporation must keep the Secretary of State apprised of its current registered office and registered agent,[7] the registered office "may be the same as any of its places of business" within the state.[8] All corporations are required to file an annual report with the Secretary of State, which must include the address of their registered office in Montana and the address of their principal

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[5]Under Montana law, a domestic corporation "has only one residence, the county in which it has its principal place of business." *Platt v. Sears, Roebuck & Co.*, 721 P.2d 336, 338 (Mont. 1986). *Accord Mapston v. Joint School Dist. No. 8*, 740 P.2d 676, 677 (Mont. 1987).

[6]Mont. Code Ann. § 35-1-1001 (1989) (now codified at Mont. Code Ann. § 35-1-1026 (1991)).

[7]Mont. Code Ann. § 35-1-1008 (1989) (now codified at Mont. Code Ann. § 35-1-1028(1)(e) (1991)); Mont. Code Ann. § 35-1-1013 (1989) (now codified at Mont. Code Ann. § 35-1-1033 (1991)).

[8]Mont. Code Ann. § 35-1-1012 (1989) (now codified at Mont. Code Ann. § 35-1-1032(1) (1991)).

office.[9] Thus, a foreign corporation need not have a principal place of business within the State of Montana and, if it does have one, need not identify it in any document filed with the Secretary of State. It is reasonable to expect, therefore, that a plaintiff seeking to choose a venue in which to file suit against the foreign corporation would have difficulty determining where, if at all, the corporation maintains its principal offices within the State. Moreover, since the corporation may select any of its places of business as its registered office, it may in fact have its principal offices elsewhere than the county housing its registered office. Requiring that corporation to defend a lawsuit in a county not necessarily housing its "principal place of business" is accordingly rationally related to the State's goal of offering an easily-identified forum to persons injured by that corporation's conduct.

Turning again to the facts of this case, additional support may be found for the conclusion that BN is not denied equal protection of the law by allowing venue to be laid in a county in which it conducts business. As the Supreme Court of Montana recognized, section 6 of the Federal Employers' Liability Act, 45 U.S.C. § 56, was designed to allow railroad workers greater flexibility when choosing a forum than that allowed other litigants. (Pet. App. at 9a.) Indeed, an injured plaintiff's right to bring the suit "in any eligible forum" is a substantial right. *Boyd*

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[9]Mont. Code Ann. § 35-1-1101 (1989) (now codified at Mont. Code Ann. § 35-1-1104 (1991)). "Principal office" is defined as "the office, whether in-state or out-of-state, that is designated in the annual report as the office where the principal executive offices of a domestic or foreign corporation are located." Mont. Code Ann. § 35-1-113(17) (1991).

v. Grand Trunk Western R. Co., 338 U.S. 263, 265 (1949).[10] By the terms of section 6 of the FELA, Congress has given the injured worker a right to "choose from the entire territory served by the railroad any place in which to sue, and in which to choose either a federal or a state court of which to ask his remedy. There is nothing which requires a plaintiff to whom such a choice is given to exercise it in a self-denying or large-hearted manner." *Miles v. Illinois Cent. R. Co.*, 315 U.S. 698, 707 (1942) (Jackson, J., concurring). It has thus been recognized that since the FELA plaintiff's right to select the forum is a substantial one, "a certain amount of forum shopping is condoned." *James v. Norfolk & Western Ry. Co.*, 430 F. Supp. 1317, 1319 (S.D. Ohio 1976). A FELA defendant is not entitled to be sued in a particular location simply because it does more business in that location than in another. *Southern Pac. Co. v. Klinge*, 65 F.2d 85, 86 (10th Cir.), *cert. denied*, 290 U.S. 657 (1933).

In short, BN's equal protection argument rings hollow when viewed in light of the circumstances of the instant

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[10]Thus, this Court has observed "that Congress has exercised its authority over interstate commerce to the extent of permitting suits in state courts, despite the incidental burden, where process may be obtained on a defendant, not merely soliciting business but actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the court's jurisdiction." *Miles v. Illinois Cent. R. Co.*, 315 U.S. 698 (1942). Since Commerce Clause analysis is not involved in this case, the Court need not weigh the State's interest against the burden imposed by the state law on interstate commerce. Rather, it need only find that the State's purpose is legitimate and that any burden imposed is rationally related to that purpose, "a relationship that is not difficult to establish." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985).

case. "Especially where Congress has sanctioned"[11] the prerogative of injured railroad workers to bring suit in the forum of their choice, this Court should be reluctant to find that State forum-selection provisions deprive the railroad of the equal protection of the laws. This is particularly true where, as here, the railroad has been sued in a venue in which it does business.

CONCLUSION

The decision of the Montana Supreme Court should be affirmed.

Respectfully submitted,

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April 1992

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[11]*Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 180 (1985) (O'Connor, J., concurring).

No. 91-779

Supreme Court, U.S.
FILED
APR 7 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
APRIL TERM, 1992

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

WILLIAM D. FORD,
Respondent.

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

THOMAS L. JOHNSON,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Montana

---

BRIEF AMICUS CURIAE OF THE MONTANA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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On Writ of Certiorari to the
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BRIEF AMICUS CURIAE OF THE MONTANA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Montana Trial Lawyers Association (MTLA) is an incorporated, voluntary association of Montana attorneys whose objective is to uphold and defend the Constitution of the United States; to advance the science of jurisprudence; to train in advocacy; to promote the administration of justice for the public good and to advance the cause of those who are damaged in person or property and who must seek redress.

Counsel for petitioner and counsel for respondents have submitted letters consenting to MTLA's participation as amicus curiae. These letters are on file with the Clerk. The MTLA supports the respondent's position that the Montana venue statute does not violate the Equal Protection Clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

MTLA files this amicus brief to address its concerns on the following issues:

1. There is a rational basis for Montana's venue statute. The Montana Legislature has specifically determined that the fundamental rule of venue in Montana is the residence of the defendant, and if the defendant is a foreign citizen, natural or corporate, it has no residence and can be sued in any county. This rule prohibits foreign natural citizens and corporations from unilaterally establishing venue in a Montana county by simply declaring such county to be its principal place of business in Montana, all without having established a Montana residency.

2. To the extent that Montana's venue statute treats foreign corporations differently than domestic corporations, the differences are not constitutionally significant when viewed in the context of the numerous procedural tools available to all litigants to assure an impartial forum. In particular, the right to exercise a peremptory challenge to an assigned judge, to seek a change of venue, and to exercise challenges to prospective jurors.

3. Montana's "open court policy", established by its Constitution, is separate and distinct from Montana's venue requirements. The Montana Supreme Court has already determined that the "open court policy" has not disadvantaged or otherwise abused petitioner.

ARGUMENT

I. *MONTANA VENUE LAW HAS RATIONAL BASIS.*

A. *Legislative History Shows Rational Basis.*

The BN contends there is no legislative history revealing the purpose of the Montana venue statute. The BN went to the effort to set forth a statutory appendix at 1(a) which glaringly leaves out the purpose of the Montana venue statute.

The BN correctly points out that Montana venue statutes were originally enacted in 1864. What the BN does not point out is that in 1985, the Legislature, after having enlisted the assistance of the Montana Supreme Court Commission on the Rules of Evidence, totally revised the Montana venue statutes. [1]

---

[1] *Recommendations for Revisions in Venue Statutes Prepared by the Montana Supreme Court Commission on the Rules of Evidence:* Chapter 432, L. 1985, was enacted based on recommendations to the Legislature as indicated in the following preface to the report that accompanied the introduced bill (Senate Bill 91):

> "This report and the accompanying draft bill are submitted to partially fulfill the request of Senate Joint Resolution 24 of the 48th Legislature that the Supreme

On page 15 of Montana Code Annotated, CHAPTER 2, VENUE, pertaining to the discussion of 25-2-118, the very statute which BN now contends has no rational basis, the following legislative history is set forth:

> *25-2-118. Residence of defendant.*
> Evidence Commission Recommendations for Revisions.
> *Explanation:* This revised section changes the location and arrangement of the most basic rules but does not alter their content significantly. Currently, section 25-2-108 [renumbered 25-2-118], which states the most fundamental of all venue rules-that the defendant has the right to have the trial in his county of residence...
> Subsection (1). This subsection extracts from the confusing welter of statutes what the Supreme Court has repeatedly called the "principal rule" of venue [residence of defendant] ...
> Subsection (2). This provision clarifies the portion of section 25-2-108 [renumbered 25-2-118] dealing with nonresident defendants. Since, by definition, a nonresident of the state is not resident in *any* county, the basic rule of subsection (1) cannot apply. In this situation the statute has always given the right of choosing venue to the plaintiff, and this draft contemplates no change.

Id. at 15-16.

> Court Commission on the Rules of Evidence prepare draft legislation for submission to the 49th Legislature to provide that 'statutory provisions on venue ... accurately reflect the current usages and interpretations of those laws...'
> The Resolution recognized that the existing statutes 'no longer reflect on their face the present state of the law,' and expressed a desire that new draft statutes be prepared incorporating the 'logical, useful, and consistent' rules and practices which have evolved by judicial construction of the present laws.
> The current venue statutes were adopted in 1864 at Bannack and are substantially the same today as when they were enacted. Throughout the 120 years of their existence these venue statutes have been the subject of dozens, perhaps hundreds, of appeals to the Montana Supreme Court. Many of the appeals were caused by the silence of the statutes on principles necessary to their operation; other appeals resulted from the ambiguity of certain fundamental language.
> * * *
> The new statutes proposed in this draft have three objectives:
> (1) to include in the Montana Code Annotated those rules which have been declared and are settled by the Supreme Court but are not now stated in the Code;
> (2) to change the language, without changing the meaning, of the sections that have caused the most litigation;
> (3) to settle the few matters where there is still a seeming ambiguity, following general principles along the lines that the Court seems to feel would be best derived from what the Court has held in other situations."

Montana Code Annotated, Chapter 2, Venue, p. 10.

The BN seems to be arguing that the subject venue statute is unconstitutional because of the way it affects non-resident corporations who have opted to designate a principal place of business in Montana, but who have not opted to become Montana residents. It is important to point out that Section 25-2-118, MCA specifically pertains to all non-resident defendants, whether they be non-resident natural citizens, non-resident corporations with no principal place of business in Montana, or non-resident corporations with a principal place of business designated in Montana.

Montana is a state whose major industry, next to agriculture, is tourism. Hundreds of thousands of people travel into Montana every year as tourists. The legislature has determined that if these persons commit torts in Montana, they can be sued in the county where the tort occurred, or any county where the injured party chooses to file the action. The legislature has determined that a defendant's residence is the fundamental venue rule and the rule simply cannot apply to a non-resident defendant. This is not only a rational rule, it is the only conceivable rule, unless, of course, the BN is contending that such out-of-state natural citizens should be able to arbitrarily determine the county that they would like to designate as the forum for the suit.

Exactly the same rationale applies to the non-resident corporation which has not chosen to label one of the 56 counties its "principal place of business in Montana". There simply is no other rational rule than the one set forth by the legislature in 1985.

Finally, the statute also applies to non-resident corporations which have property and agents spread throughout Montana, and which have arbitrarily chosen to call one county its principal place of business. That non-resident corporation also has no residence in the State of Montana, and can be sued in any county.

It is hard to imagine a state having a more comprehensive up-to-date legislative history than Montana's 1985 total revision of its venue statutes. The objectives of the Supreme Court Commission and the legislature have been set forth, specifically, above. The Supreme Court Commission and the legislature reaffirmed the fundamental rule of venue in 1985. Because the legislature has found that the most fundamental venue right of a defendant is to be sued in the county of his residence, and because, by definition, a non-resident has no residence in any county, the legislature has reached the rational conclusion that such non-resident can be sued in any county. The Montana Supreme Court Commission on the Rules of Evidence and the legislature have spoken, and have explained their rational basis for the rule, and the inquiry must stop here.

B. *Looking Beyond the Legislative History.*

If, for the sake of argument, one were to state that the legislative history, discussed above, were not sufficient to absolutely prove the rational basis, one merely needs to apply the language of this Court in *Metropolitan Casualty*

Insurance Co. v. Brownell, 294 U.S. 580 (1935), which only requires a state of facts which "reasonably may be conceived" to justify the statute. Therefore, the reasonable bases of the legislation, in addition to the legislature's stated purpose, should be reviewed.

The rational basis for this rule is to prevent a foreign corporation, like BN, from hand-picking a county where it wishes to be sued without becoming a Montana resident.

For instance, according to the Affidavit of Mark C. Bruce, (Pet. App. 4(a): JA 20-21), some time during the year 1989, BN chose Havre as its self-designated principal place of business. By moving its principal place of business from Yellowstone County where it had been for years and years, to Hill County, where Havre is located, the BN hopes to be sued only in Havre, where the BN literally controls the town. This is precisely the tact which the Montana Supreme Court Commission on Evidence and the Montana legislature were preventing in 1985. If this were not the rule, a foreign corporation, like the BN, without becoming a resident of Montana, could randomly choose any county it desired as its principal place of business, thereby forcing all tort victims to sue it in its hand-picked county.

The BN's position that it ought to be able to hand-pick the county where it will be sued, becomes much more serious when applied to the BN, a national railroad, whose employees are forced to work throughout the state, in locations sometimes greater than 500 or 600 miles apart. Under such circumstances, the BN could force an injured worker to file suit against the BN in Havre, or any other hand-picked, out-of-the-way venue, when the employee was injured hundreds of miles away. The legislature specifically chose to avoid that problem, as the legislative history so states.

It must be noted, however, that in order to assure impartiality in the choice of venue, the legislature, in 1985, passed the other venue statute, 25-2-201. See argument set forth in section II(B)(2), *infra*.

Another rational reason for this law is that the Supreme Court Commission on Evidence and the Montana Legislature knew that if a railroad or other foreign corporation could hand-pick its venue by designating the county where it chose to be sued without becoming a resident, the corporations could force claimants to travel to far reaches of the State, which would put a heavy financial burden on the injured, out-of-work claimants. For instance, the BN has chosen Havre. In Havre, there is no interstate highway, there is no jet air transportation, there is no adequate airport, and there is no major medical facility.

BN continuously states that a resident can only be sued in the county of its residence, whereas non-residents can be sued in any county. This is not correct. A resident can only be sued in the county of his residence, or, if he ventures outside that county and commits a tort, he can also be sued in the county where the tort occurred. Most Montana residents, as a practical matter,

are going to be involved in litigation arising out of the county of their residence, unless they leave that county and commit a tort in another county, or agree to perform a contract in another county. A non-resident defendant, whether corporate or a natural citizen, is not going to have the same type of local tie to a county, and hence can be sued in any county, subject to the express statutory authority *mandating* the district judge to change the place of trial if there is a showing that a defendant cannot receive a fair trial in the county where the case was originally filed, or if, in a non-FELA case, the convenience of witnesses would be better served. (See argument in paragraph II(B)(2), *infra*.).

The BN attempts to argue that the venue statute in question creates discrimination between resident corporations and non-resident corporations. However, the statute is in no way restricted to non-resident corporations, but applies to all non-residents, natural citizens and corporations. Query: Does the statute violate equal protection guarantees for non-resident corporations, but not for non-resident natural persons?

C. *To Hold with the Hare and Run with the Hound.*

The BN has attempted to convince this Court that *Power Manufacturing Co. v. Saunders*, 274 U.S. 490 (1927), is the controlling law, and that *Cincinnati Street Ry. v. Snell*, 193 U.S. 30, 36-37, 48 L.Ed 604, 607-08 (1904), and *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 644-45, 48 L.Ed.2d 263, 271 (1976), are not the law. What the BN tells this Court in the case at bar is not what the BN told the Montana Supreme Court in *Haug v. BN*, 770 P.2d 517 (Mont. 1989), a case cited by BN in its brief. Haug, a Montana resident, was injured in Livingston, Montana, where he was employed by the BN. He chose to bring his FELA action in Cascade County and the BN moved to change the venue to Park County, claiming that Haug could only bring the case in the county where he was injured, relying on *McAlear v. Kasak*, 731 P.2d 9087 (Mont. 1987), where the court, after the 1985 amendment to the Montana venue statutes, had ruled that a non-resident could only be sued in the county where the tort occurred. [This decision was overruled in *Haug v. BN*, 770 P.2d 517]. The result of the *McAlear* decision was that a non-resident plaintiff, because of Montana's Constitution, could sue a non-resident defendant in any county in the State, whereas a resident plaintiff could only sue a non-resident in the county where the tort occurred. BN's position on this issue caused Haug to point out to the Montana Supreme Court that if the BN's position were correct, there would be an equal protection violation against Haug because BN's reading of the venue statute would discriminate against resident plaintiffs and in favor of out-of-state plaintiffs.

The BN responded to this equal protection issue in its reply brief in *Haug v. BN*, No. 88-438 in the Supreme Court of the State of Montana, by arguing

directly contrary to its present argument. The verbatim argument of the BN to the Montana Supreme Court is set forth below.

> *Different venue treatment does not result in denial of equal protection and is not otherwise unconstitutional:* (italics added)
> "It is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights. Given therefor a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the State has deemed best to provide for a trial in one forum or another. It is not under any view the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail."
> *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 644-45, 48 L.Ed.2d 263, 271 (1976) (quoting *Cincinnati Street Ry. v. Snell*, 193 U.S. 30, 36-37, 48 L.Ed 604, 607-08 (1904).
> In light of this standard, Haug's bald assertions of unconstitutionality are meritless.

See pages 5 and 6 of Appellant's Reply Brief, *Haug v. BN*, No. 88-438.

On November 11, 1988, in *Haug*, the BN told the Montana Supreme Court that different venue treatment does not result in the denial of equal protection and further told the Montana Supreme Court that this Court's ruling in *American Motors Insurance Co. v. Starnes*, 425 U.S. 637, and *Cincinnati Street Ry. v. Snell*, 193 U.S. 30, set forth the appropriate standard. Now the BN is trying to convince this Court that the holdings of *Starnes* and *Snell* are not the law and that the law really is as set forth in *Power Manufacturing Co. v. Saunders*, 274 U.S. 490 (1927), which is inapposite, at the very least.

The BN's argument is disingenuous. In light of what it argued to the Montana Supreme Court in *Haug*, the BN should not be allowed to "hold with the hare and run with the hound." See *Humphrey, Robert: Complaint for Reformation* (1572).

Based on all of the authority of this Court, there simply is no question but that 25-2-118 has a rational basis and does not violate the Equal Protection Clause of the Fourteenth Amendment.

II. *THE MONTANA VENUE STATUTE DOES NOT EFFECT ANY REAL AND SUBSTANTIAL DISCRIMINATION AGAINST FOREIGN CORPORATIONS.*

This Court has found that "[i]n most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great West United Corp.*, 443 U.S. 173, 183-84 (1979). These concerns with unfairness and inconvenience are equally applicable to state venue requirements.

In challenging Montana's venue statute, BN has focused on the question of unfairness. It has not argued with any conviction that the venue statute, as applied to the pending suits, creates any inconvenience to BN. Indeed, such a claim would be untenable given that the venue is in Billings (Yellowstone County). Billings is not only the most populous city in the State, but is also only 80 miles from the State of Wyoming - the state of the alleged injuries to the plaintiffs. In contrast, the city of Havre, Montana (Hill County), where BN claims to maintain its principal place of business, is over 300 miles to the north on Montana's Canadian border.

The question of whether Montana's venue statute creates any real and substantial discrimination must therefore focus on the issue of "unfairness".

BN contends that Montana's venue statute lends itself to forum shopping by plaintiffs "who take out-of-state corporations to court in Montana and take free advantage of idiosyncrasies in the bench and jury venire in selected county courts, to the obvious disadvantage of these multi-state businesses incorporated elsewhere." (Brief for Petitioner, p. 38-39).

There is an unspoken assumption in BN's argument that the judges and jurors in Yellowstone County will be somehow less fair and unbiased than judges and jurors elsewhere. Further, there is an assumption that the law will be applied differently in Yellowstone County than in other counties. There is no basis for these assumptions.

If a defendant corporation nonetheless suspects bias by the judge or jury venire, it has numerous procedural devices available to correct the situation. The defendant (as well as the plaintiff) can, for no stated reason, move to substitute a new judge to replace the assigned judge. In selecting the jury, each defendant can exercise four peremptory challenges and an unlimited number of challenges for cause. If the defendant can show an inability to obtain an impartial trial in the designated venue, it can move to have the venue changed to another county, and the trial court *must* change the venue.

A. *If the Discrimination in Question is Insignificant, There is No Equal Protection Violation.*

The fact that all discrimination in venue statutes is not necessarily significant or substantial is illustrated by this Court's decision in *American*

Motorists Ins. Co. v. Starnes, 425 U.S. 637 (1976). In *Starnes*, the Court upheld a Texas venue statute against an equal protection challenge. Under the Texas venue statute, domestic corporations had to be sued in the county in which they were domiciled unless the plaintiff, at a preliminary hearing, could prove by a preponderance of the evidence that he had a cause of action. Foreign corporations could be sued in counties other than their Texas domicile without a similar procedural requirement. The appellants contended that, as a foreign corporation, it was denied the unique opportunity afforded domestic corporations to preview the adversary's case, cross examine plaintiff's witnesses and nip a frivolous claim "in the bud." *Id.* at 642-43.

As BN acknowledges in its brief (Petitioner's Brief, p. 35) the Court determined, during oral argument of *Starnes*, the showing actually required of domestic corporations was merely a *prima facie* showing; that in light of the many and far more extensive discovery tools equally available to all litigants, the overall effect of the different treatment of domestic and foreign corporations was negligible. Accordingly, the Court concluded that the Texas venue scheme presented no denial of equal protection.

B. *The Difference Between Domestic and Foreign Corporations Under Montana's Venue Statute is Negligible in Light of the Many Procedural Safeguards Against Bias or Prejudice.*

BN seeks to have the Montana venue statute declared unconstitutional on the assumption that it unfairly subjects foreign corporations to the idiosyncracies in the bench and jury venire in selected counties. There is nothing in the record which would support a conclusion that BN is less likely to receive a fair and impartial judge and jury in Yellowstone County than it is in Hill County. On the contrary, a review of Montana's history and statutory law compels a conclusion that impartiality is assured in Yellowstone County, as well as any other Montana county.

In *Starnes*, this Court did not confine itself to the language of the challenged venue statute. *Starnes* at 645. Rather, the Court relied upon statements made during oral argument as to how the Texas statute was implemented in practice.

In the present cases, the Court likewise should not confine itself to the language of the Montana venue statute in question. It should ascertain the practical effect of the venue law in the context of the other Montana statutory procedures designed to eliminate any prejudice arising from venue selection. These safeguards are discussed below.

1. *Substitution of Judge.*

Burlington Northern is not the first foreign corporation to feel that it is being victimized by Montana's venue statutes. The issue was brought to a

head during the copper wars of 1903. The issue was resolved through adoption of the "fair trial" bill. The venue statute in question must be judged in the context of that history and the legislation which was forced upon the State of Montana by a foreign corporation, the Anaconda Copper Mining Co., to gain relief from the venue statute.

At the turn of the century, Montana's economy (mining & timber) was dominated by Anaconda Copper Mining Company (Standard Oil). In 1903, Anaconda Copper was having great difficulty dealing with a young mining entrepreneur named F. Augustus Heinze, in Butte, Montana - then known as the "richest hill on earth." Heinze directed his minions to purchase stock in two of Anaconda's subsidiary corporations. The Heinze agents then brought suit alleging that, under Montana law, Anaconda Copper was an illegal trust. The presiding judge was Judge William Clancy who, by then, had a record of handing millions of dollars worth of stolen property over to Heinze. Howard, Joseph Kinsey, *Montana: High, Wide, and Handsome*, Yale University Press, New Haven, 1959, pps. 73-84. As anticipated, Judge Clancy ruled with Heinze. In response, Anaconda Copper immediately shut down all operations in the State of Montana - Butte's mines, Anaconda's smelter, Great Falls' copper refineries, Missoula's lumber mills, coal mines, gold mines and company stores. Twenty thousand men were out of work the next morning. *Id.* at 75. After a few weeks of economic pressure, Anaconda let it be known that if Montana's governor would call a special session of the legislature and pass a "fair trial" bill, Anaconda might reopen its mines. *Id.* at 80. The "fair trial" bill allowed any party to a suit to charge (without proof) that a judge was biased, thus forcing him to recuse himself and call in a new judge.

On December 1, 1903, the Governor called the special session and the "fair trial" bill passed as a matter of course.[2] In a twist of fate, Heinze's judges were defeated in the next election in favor of Anaconda's candidates. Anaconda had shut down the State of Montana in order to pass the "fair trial" bill. That very bill subsequently allowed Heinze to thwart Anaconda's judicial steamrolling in later years. *Id.* at 81. The constitutionality of the "fair trial" bill was upheld by the Montana Supreme Court in *State ex rel. Anaconda Copper Mining Company v. Hon. William Clancy*, 30 Mont. 529, 77 Pac. 312 (1904).

The substance of the 1903 "fair trial" bill is still on the books in Montana

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[2] "An Act to Amend Section 180 of the Code of Civil Procedure." Section 180 was amended by adding subdivision 4 which provided as follows: "When either party makes and files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge by reason of the bias or prejudice of such judge... Upon the filing of the affidavit the judge as to whom said disqualification is averred, shall be without authority to act further in the action.*** No more than five judges can be disqualified for bias or prejudice, in said action or proceeding.***" This was then re-enacted as Section 6315 Rev. C. 1907.

although substitutions are now limited to one per side rather than the original five. Section 3-1-804, MCA (1991) provides:

> 1. A motion for substitution of a district judge may be made by any party to a proceeding only in the manner set forth herein. In a civil or criminal case, each adverse party, including the state, is entitled to one substitution of a district judge.
> (a) A motion for substitution of a district judge shall be made by filing a written motion with the clerk, as follows:
> "The undersigned hereby moves for substitution of District Judge in this case."

Montana is one of only three states (Alaska, Montana, and New Mexico) that allow for a peremptory challenge to a judge without any mention or showing of prejudice. *Disqualification of Judges for Prejudice or Bias*, (1969) 48 Ore. L.Rev. 311, 346.

If BN is of the opinion that FELA plaintiffs, like Heinze, are taking "free advantage of the idiosyncrasies in the bench" (Petitioner's Brief, p. 38), then BN should avail itself of Anaconda's "fair trial" legislation and move to substitute the judge under 3-1-804, MCA. The motion requires no evidence or proof of prejudice. The substitution is automatic with no questions asked. This procedural tool completely defuses BN's contention that it is suffering any substantial discrimination or prejudice as a result of Montana's venue statutes. Any advantage that a plaintiff may have in this respect is more than offset by the defendant's ability to substitute a new judge. As in *Starnes*, the overall effect of the difference is negligible and does not constitute a denial of equal protection.

2. *Change of Venue.*

BN argues that Montana's venue system allows plaintiffs to take advantage of idiosyncrasies in the jury venire as well as on the bench. Montana law, however, provides adequate procedural safeguards to protect against any concerns that BN may have as to its ability to receive a fair trial in the selected venue.

In the present cases, BN filed motions pursuant to 25-2-114, MCA to change the place of trial to BN's "principal place of business" - Hill County (Havre) Montana. Section 25-2-114, MCA allows a defendant to challenge the venue if suit is brought in a "county not designated as the proper place of trial." Despite having lost such a motion, a foreign corporation still has other procedural tools available if it believes it cannot obtain a fair trial. Section 25-2-201, MCA provides:

> When a change of venue required. The court or judge must, on a motion, change the place of trial in the following cases:
>
> (1) when the county designated in the complaint is not the proper county;
> (2) when there is reason to believe that an impartial trial cannot be had therein;
> (3) when the convenience of witnesses and the ends of justice would be promoted by the change.

The Montana Supreme Court has ruled that a foreign defendant can be sued in any county in the State. Since any county which is selected by the plaintiff is a proper county for venue purposes, "a non-resident defendant is not entitled to a change of venue for the reason that the plaintiff has chosen an improper county under 25-2-201(1) MCA." *Haug v. Burlington Northern RR Co.*, 236 Mont. 368, 371-72, 770 P.2d 517 (1989). Nevertheless, the defendant still has the opportunity to invoke subsections 2 and 3 of 25-2-201, MCA which mandate a change of venue for more substantive reasons - inability to obtain an impartial trial and promotion of the ends of justice.[3]

Although the District Court ruled that Yellowstone County was properly designated as the county for venue under 25-2-114, MCA and 25-2-201(1) MCA - if a foreign corporation can substantiate its belief that it cannot receive an impartial trial in Yellowstone County, it can, nonetheless, invoke subsection 2 of 25-2-201, MCA and seek to have the matter moved to another county.

As this Court has recognized, fairness and convenience are the two primary factors in determining venue. *Leroy v. Great West United Corp.*, 443 U.S. 173, 183-84 (1979). Montana's change of venue statute, 25-2-201, MCA offers protection to a defendant on both counts. Subsection 2 allows for change of venue if an impartial trial cannot be had. Subsection 3 allows for change of venue in the interests of justice and witness convenience. In discussing this safeguard, the Montana Supreme Court has stated in *Putro v. Mannix Electric, Inc.*, 147 Mont. 314, 412 P.2d 410 (1966),

> [A] change of place of trial must be by the Court ordered "when the convenience of witnesses and the ends of justice would be promoted by the change." The provisions of this section are mandatory,

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[3] Although the Montana Court in *Haug* found that a FELA defendant cannot invoke *forum non conveniens* for convenience of witnesses, the issue before this Court is not confined to FELA actions. Rather, the constitutionality of the Montana venue statute, on its face, is at issue. The venue statute must therefore be judged in light of procedural tools available to defendants in a normal, transitory action.

> and require the district court to change the venue, ... after a motion has been made and a sufficient showing made by the defendant.

Id., P.2d at 412.

As in the *Starnes* decision, Montana's change of venue laws render any arguable disadvantage to a defendant negligible. There is no significant or invidious discrimination against defendants, be they domestic or foreign, corporate or natural.

3. *Challenges to Jurors.*

In addition to substituting a judge and moving for a change of venue for inability to obtain an impartial trial, a defendant has the added protection of challenges to the prospective jurors.

Montana law allows a litigant to challenge jurors for cause, Section 25-7-223, MCA. The law does not place a limit on the number of challenges for cause that may be exercised by a party so long as the challenges fall within the criteria set forth in the statute. Section 25-7-223, MCA sets forth seven grounds for challenge for cause, including: (6) having an unqualified opinion or belief as to the merits of the action; and (7) the existence of a state of mind in the juror evincing enmity against or bias in favor of either party.

Further, Section 25-7-224, MCA allows each party to exercise four peremptory challenges in the selection of a twelve-person jury.

The right to exercise peremptory challenges and challenges for cause affords the foreign corporation further protection against any prejudice that may exist by virtue of the plaintiff having chosen the venue. These safeguards, when combined with the right to substitute a judge and move for a new venue, place the parties on an equal footing in their quest for impartial justice.

BN is asking this Court to assume that BN cannot receive a fair trial in a venue selected by the plaintiff. There is no evidence to support such a conclusion. Furthermore, in order to reach this conclusion, the Court would have to ignore the fact that BN has adequate tools to assure impartiality. The Fourteenth Amendment protects fundamental rights, not the particular forum which a state deems proper. If BN is assured of impartiality in a tribunal where equal laws prevail, it is not being denied equal protection of the laws. *Cincinnati Street R. Co. v. Snell*, 193 U.S. 30, 36-37 (1904).

In practice, given the procedural tools afforded each party, there is no real discriminatory effect resulting from Montana's open-ended venue statute as applied to foreign corporations or natural citizens. Application of the venue statute does not deny BN equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

III. *NO REAL OR SUBSTANTIAL DISCRIMINATION.*

A. *The Montana Supreme Court has Repeatedly Found No Discrimination.*

The BN claims that the Montana venue system creates real and substantial litigation disadvantages. In support of such contention, BN has filed affidavits attempting to show the number of cases filed against it in Yellowstone County and Cascade County by out-of-state railroad workers, who were injured out of state. These out-of-state railroad workers are entitled to bring such actions in Montana, pursuant to Montana's "open court policy", which is based directly on Article II, Section 16 of the 1972 Montana Constitution. The BN repeatedly refers to this "open court policy" and the fact that it can be sued in FELA cases in Montana by non-resident plaintiffs. The BN is attempting to somehow turn this constitutional right into an argument that the Montana venue statute is unconstitutional. This argument on the part of the BN is nothing but a "red herring" and should be ignored totally. It simply has no relevance to the equal protection issue before this Court. Furthermore, whatever determination may be made concerning the constitutionality of 25-2-118, MCA, the constitutionally mandated "open court policy" of the State of Montana will remain.

However, because the BN has raised such a clamor about its self-perceived discrimination, it appears that some response needs to be made to this contention.

Before this Court is swayed to any extent by the BN affidavit or the list of FELA cases filed in Montana, this Court should be aware that the Montana Supreme Court has determined on three separate occasions that there simply is no basis for the BN's claim that it has been prejudiced or has somehow suffered real and substantial litigation disadvantages because of the constitutionally mandated "open court policy".

In *State ex rel. Great Northern Railway Co. v. District Court*, 365 P.2d 512 (Mont. 1961), one of BN's predecessors attempted to convince the Montana supreme Court that Montana's "open court policy" of allowing out-of-state railroad employees injured out of state to bring their action in Montana in any county which was convenient for the railroad worker created substantial litigation disadvantages for the railroad. The Supreme Court, after reviewing all of the bases which the railroad could present, stated as follows:

> Having these considerations in mind, if it appeared that a great number of such actions were being filed in Silver Bow County we would be adverse to permitting the practice to continue. However, from the record before us it appears that eighteen of such actions have been filed there in the past eleven years, which would not indicate a trend, as of this time, of importing this type of litigation.

> Since our sister state has not seen fit to adopt the rule, and by reason of the other matters hereinbefore set forth, we do not feel justified in this instance to establish the rule. We do state, however, that if a substantial increase in this type of litigation is called to our attention in the future we will re-examine the situation in light of what we have herein stated.

Id. at 514.

Eighteen years later, after the Great Northern Railroad had merged into BN, BN again tried to convince the Montana Supreme Court that it was incurring substantial litigation disadvantages because of the procedure allowing out-of-state railroad employees to sue in Montana. Again, the Montana Supreme Court, having reviewed all of the information available from the courts of the State of Montana, found there was no substantial increase in this type of litigation and refused to prevent this type of litigation. In this regard, the Court stated:

> We repeat the warning set forth in *State ex rel. Great Northern Ry., supra*, 139 Mont. at 457, 365 P.2d 514. "[I]f a substantial increase in this type of litigation is called to our attention in the future we will examine the situation in light of what we have herein stated."

LaBella v. Burlington Northern, Inc., 595 P.2d 1184, 1187 (Mont. 1979).

Montana's "open court policy" is not simply a policy, but is *constitutionally mandated*. As the Court in *LaBella*, stated:

> The policy of the State of Montana is clearly announced in the State Constitution. "Courts of justice shall be open to every person, and speedy remedy afforded for every injury to person, property, or character." 1972 Mont. Const., Art. II, Section 16. This constitutional right is unrestricted by reference to residence or citizenship.

LaBella, at 1187.

Later in 1979, the BN again tried to convince the Montana Supreme Court that too many of these types of cases had been filed and that the BN was suffering substantial litigation disadvantages. In *Bevacqua v. BN*, 598 P.2d 1124 (Mont. 1979), the Court again found against the BN and stated:

> Our decision in this case is controlled by *LaBella v. Burlington Northern* 1979, Mont., 595 P.2d 1184, 36 St.Rep. 1016. The doctrine of *forum non conveniens* must be tempered with the open

door policy as stated in *LaBella*, and there is presently no reason that causes us to apply it to FELA actions, as there has been no demonstrated abuse.

Bevacqua at 1125.

Eight years later, the BN tried again. In the case of *State ex rel. BN v. District Court*, 746 P.2d 1077 (Mont. 1987), the BN once again claimed that this "open court policy" was causing it real and substantial litigation disadvantages. Once again, the Montana Supreme court, *after reviewing all of the information available in the State of Montana*, specifically found contrary to the assertions of BN.[4]

In the cases at bar, the BN again presented the Montana Supreme Court with all facts it could muster in support of its claim that it was suffering real and substantial litigation disadvantages because of the "open court policy".

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[4] Burlington Northern also filed statistics obtained from the Montana State Judicial Information System. From those statistics, it appears that in 1986, there were 16,397 civil filings statewide of which 1,828 related to tort. The numbers increased for 1984, when there were 15,045 civil filings statewide, of which 1,640 represented tort actions.

The statistics provided by Burlington Northern in its applications fail to meet the "substantial increase" in FELA cases so as to show an intolerable burden of this state in maintaining its "open door" policy and meeting the obvious intention of the federal statute that the plaintiff could make a choice of forum in which to try his FELA claim. Burlington Northern concedes that most FELA cases are settled before they ever go to trial. The pendency of two FELA cases in the District Court of Cascade County, two in Yellowstone County, and one each in Missoula County, Silverbow County, and Park County are insufficient in number to cause this Court to move from its settled decision in the earlier cases to maintain the "open door" policy and to follow the provision of our Montana Constitution that "courts of justice shall be open to every person and speedy remedy afforded for every injury of person, property or character." Art. II, Section 16, 1972 Mont. Const. *LaBella*, 182 Mont. at 207, 595 P.2d at 1187.

The budgetary figures presented for Yellowstone and Cascade Counties represent the total operation of the whole District Court, and all the cases, civil and criminal, that come before those courts. There are three district judges serving the Eighth Judicial District, including Cascade County, and five district judges serving the Thirteenth Judicial District, including Yellowstone County. Although the district judge in Yellowstone County indicated that a trial may not be available in that county for two years, it does not appear that the removal of two cases from its docket will substantially lessen the burden on that District Court, nor would the elimination of seven cases statewide have a like effect on all state courts. Seven pending FELA cases, where there are over 16,000 civil cases filed statewide per year is not a significant number of cases as to require the exercise of our power of supervisory control.

* * *

In the light of the statements of this Court and *LaBella*, *supra*, and earlier cases, and the paucity of evidence submitted by the applicant that pending FELA cases are a burden on the Montana courts or the taxpayers of this state, and applications in each cause for a writ of supervisory control are denied.

State v. District Court at 1080 and 1081.

Once again, the Montana Supreme Court found that BN was not suffering any substantial litigation disadvantages and that there was no reason to set aside the constitutional "open court policy" of Montana. It seems strange, indeed, for the BN to attempt to convince this Court that it somehow is suffering real and substantial litigation disadvantages when the Montana Supreme Court, which is absolutely in the best position possible to rule on the issue, has re-examined the situation and has found that there is no problem.

Suffice it to say that BN's claim of substantial litigation disadvantages should be totally ignored by this Court, and this Court should accept the findings of the Montana Supreme Court from 1961, to date, as conclusive on this issue.

B. *Yellowstone County is not an Inconvenient or Illogical Venue for BN.*

The BN claims that it is being severely prejudiced by having the two underlying FELA claims brought against it in Yellowstone County. Of course, Section 56 of the FELA, 45 U.S.C., Section 56, reads as follows:

> Under this chapter an action may be brought in a district court of the United States, in the district residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business as the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states.

Id. at 1186.

Therefore, Congress found it was perfectly appropriate for a railroad to be sued in an FELA case in any district in the United States where it shall be doing business. The BN seems to imply to this Court that Yellowstone County, where Billings is located, is somehow a foreign ground for the BN. It claims on page five of its brief:

> The BN has some trackage in Yellowstone County but, as noted above, its principal place of business in the State is in Hill County.

BN's involvement in Yellowstone County is much more expansive than the mere ownership of some trackage. For instance, until late 1989, BN had its corporate headquarters, its superintendent, and its claims department in Billings, which was the absolute hub for the BN operations in the State of Montana.

Sometime in 1989, the BN chose to move some of its corporate personnel 300 miles away to an extremely small county on the Canadian border where

Havre is located. Havre is a town in which 900 of BN's 1,700 employees work. According to the Affidavit of Mark C. Bruce, the BN closed its regional and divisional offices in Yellowstone County some time prior to October 4, 1989, and moved its principal place of business to Havre. Of course, in Montana, there is no legal requirement, nor any legal procedure for moving a foreign corporation's principal place of business from one county to another. The foreign corporation simply elects when, how, and where it chooses to call its principal place of business.

In any event, even though the BN claims to have moved its "principal place of business" to Havre, it has maintained its claims office in Billings and its retained counsel, Kurt W. Kroschel & Associates, who handles all of the FELA claims in Montana, is also located in Billings, Yellowstone County.

Furthermore, Billings, Montana, is the largest city in the State of Montana. The only other city in Montana where BN does business, which is a hub of any type, is Great Falls, located in Cascade County. There is virtually no other city, besides Great Falls and Billings, where the BN does business which has any reasonable air transportation, any reasonable medical community, or any reasonably sized court facility. For instance, Billings has five district judges, and Great Falls has three district judges, while the rest of the State, where the BN does business, is extremely limited in its court facilities.

It comes as no surprise that FELA cases against the BN in Montana are brought in Billings, Yellowstone County, and in Great Falls, Cascade County. These are the only two centers of the railroad industry in Montana, and they are, by far, the most convenient venue for injured FELA claimants, the witnesses, the doctors who, for the most part, reside in Great Falls or Billings, and BN's counsel and claims department.

Furthermore, out-of-state witnesses brought in by the claimants and the BN simply cannot reach Montana by reasonably afforded air service anywhere the BN does business, except in Great Falls and Billings. It is hardly surprising, under these circumstances, that Yellowstone County and Cascade County are the recipients of several FELA case filings by out-of-state injured railroad workers.

For the BN to raise an alarm about being prejudiced by having to defend FELA cases in Cascade County and Yellowstone County, under these circumstances, especially when the Montana Supreme Court has repeatedly held that there is no abuse, strains credibility, to say the least.

The BN and the amici who have filed briefs on behalf of the BN, attack the subject venue statute, mainly on the ground that out-of-state plaintiffs can come to Montana and sue the BN, even though the out-of-state plaintiffs were injured out of state. The fact that such out-of-state plaintiffs can come into Montana and bring lawsuits against the BN under the FELA is a situation created by the 1972 Montana Constitution. It is not for this Court to determine if the "open court policy" of the State of Montana, based on its state

constitution, is appropriate in FELA cases.

Suffice it to say that the Montana Supreme Court has already determined there is no real or substantial discrimination by the filing of out-of-state FELA claims in Montana. Furthermore, the issue on appeal is the constitutionality of the Montana venue statute, and such issue should not be obscured by the BN's constant referral to the "open court policy" of the State of Montana.

CONCLUSION

The judgment of the Montana Supreme Court should be affirmed.

RESPECTFULLY SUBMITTED,

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April 8, 1992